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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1590

UNITED STATES OF AMERICA, *Respondent*

v.

PATRICK L. TIGHE, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

PATRICK L. TIGHE, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Patrick L. Tighe, M.D., prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on February 25, 1977 (No.: 76-1849).

OPINION BELOW

There was no formal opinion of the United States District Court for the Middle District of Pennsylvania, except for the Memorandum of that Court in support of its orders denying Petitioner's motions for judgment of acquittal and for a new trial. This memorandum is reproduced in Appendix A to this Petition. The Court of Appeals for the Third Circuit issued an opinion affirming the District Court, and is reproduced as Appendix B. Neither opinion has been reported as yet.

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on February 25, 1977. A Petition for enlargement of time to file a Petition for rehearing before the court en banc was granted, and a Petition for rehearing en banc was then timely filed in accordance with that enlargement on March 25, 1977. The Circuit Court's denial of said Petition was issued without hearing on April 14, 1977. A copy of that order is reproduced as Appendix C to this Petition.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

The instant Petition presents the following questions for consideration:

1. Did the placement before the jury of hearsay statements allegedly made by Petitioner, containing self-incriminatory material, by their nature confessions, violate Petitioner's 4th, 5th and 6th Amendment rights?

2. (a) Does the Congressional delegation to the Attorney General permitting him to transfer controlled substances between Schedules III and II of 21 U.S.C. § 801 *et seq.*, in effect provide for the creation of a crime by an officer of the Executive, thus offending and abridging Article I, Section I, of the Constitution of the United States; and

(b) Are the standards for inclusion under Schedules II and III so vague as to be unconstitutional?

3. Whether Petitioner can be convicted for a crime of which the evidence shows he could not reasonably have had notice.

4. Were Petitioner's rights under the 5th and 6th Amendments infringed by the Assistant United States Attorney's inflammatory and improper closing arguments to the jury?

5. Whether the Government failed to establish a critical element of the crime charged in light of the fact that the evidence shows that not one of the prescriptions allegedly issued by Petitioner were ever filled.

6. Whether Petitioner was properly prosecuted under 21 U.S.C. § 841(a) inasmuch as he is clearly not within the target area of the legislation.

7. Were the trial court's instructions on important trial issues so confusing and improper as to deny Petitioner his 5th and 6th Amendment rights to a fair trial?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States
Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States
Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Controlled Substances Act of 1970

21 U.S.C. § 802 (6), (8), (10), (11), (20), (25), § 811 (a), § 812(a) and (b) (2) and (3) (not Schedule I), § 829(a) and (b), § 841(a)(1), § 842(a)(1) and (c) (1) and (2), § 846. See Appendix D for text.

STATEMENT OF THE CASE

A. Indictment, Sentence, and Appeal

The defendant, Petitioner herein, Patrick L. Tighe, was indicted on December 18, 1974, in the United States District Court for the Middle District of Pennsylvania on eighteen counts for knowingly, willfully, unlawfully and intentionally distributing and dispensing a Schedule II controlled substance, biphetamine, in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2(b). The dates of the alleged violations are indicated in the indictment, reproduced in Appendix E to this Petition. Petitioner entered a plea of not guilty on January 10, 1975, and moved to dismiss the indictment on February 13, 1975, asserting as grounds for his motion the theories that the indictment failed to include all essential elements of the crime charged, inasmuch as none of the prescriptions for biphetamines were filled; that the indictment failed to set forth conduct that would be criminal, inasmuch as Petitioner is a licensed medical doctor and authorized to issue such prescriptions; that the statute provided for an unconstitutional delegation of authority to the Attorney General to modify schedules of controlled substances; and that the statutory procedure established for administrative reclassification of controlled substances is too vague and indefinite to be given constitutional sanction.

The motion to dismiss the indictment, after briefing and argument, was denied by the trial court on April 8, 1975.

Jury trial commenced on June 3, 1975, and resulted in a verdict of guilty on all counts charged on June 5, 1975. A motion for mistrial was orally made by

defense counsel on June 5, 1975, based upon improper closing remarks by the prosecution, and that motion was denied. After verdict, on June 10, 1975, a motion for acquittal was filed as well as a motion for a new trial, with additional reasons for new trial being filed on June 15, 1975. After briefing and argument, on March 15, 1976, the trial court denied Petitioner's motion for acquittal, and on March 16, 1976, denied his motion for a new trial. A memorandum in support of these rulings (Appendix A) was issued on August 13, 1976.

On June 11, 1976, a Judgment and Probation/Commitment Order was entered, reproduced as Appendix F to this Petition. Petitioner was sentenced therein to imprisonment for a term of six months and fined $15,000 on Count I of the indictment. On Counts 2-18, he was sentenced to six months' confinement and $15,000 fine, to run concurrently with the sentence under Count I. In addition to the sentences imposed, Petitioner was placed on parole amounting to 36 years. The Order noted Petitioner as having been convicted of distributing a controlled substance, even though distribution had been eliminated from the jury's consideration by the trial court, *infra,* and being convicted of violating 18 U.S.C. §2(b), even though the trial court charged the jury that this section was not in the case (Appendix H, at 45a, lines 5-11).

A Notice of Appeal was filed, and after briefing and argument, the United States Court of Appeals for the Third Circuit affirmed the decision of the trial court on the various issues raised on appeal (Appendix B). A petition for rehearing en banc was filed

on March 25, 1977, and an Order denying rehearing, without opinion, was issued on April 14, 1977 (Appendix C).

B. Trial Developments Relevant To This Petition

For the purpose of this Petition, except as amplified, *supra,* the facts of this case are adequately contained in the decision of the Third Circuit (Appendix B).

Counts 1-18 of the indictment alleged for the dates involved a knowing, willful, unlawful and intentional distribution and dispensing of a Schedule II controlled substance, biphetamines. The Government's proof at trial developed, however, that at no time were any of the prescriptions filled.

The dominant theory ultimately embraced by the Government was that Petitioner dispensed a Schedule II drug in violation of 21 U.S.C. §841(a). Indeed the distribution aspect of the indictment was stricken from the case by the trial court (see Appendices B, at 24a, lines 1-5; G, at 42a, lines 19-32; and H, at 45a, lines 22-29, and at 46a, lines 1-8) as was the indictment as it related to 18 U.S.C. §2(b). (Appendix H, at 45a, lines 5-11.) This point is significant, and its importance will be discussed *infra* in headings V and VII.

The evidence at trial disclosed that there was no general publication of the transfer of biphetamines from Schedule III to Schedule II by appropriate drug companies, and that the notice of such transfer published in the *Federal Register* was not even available in Lackawanna County, the County in which Petitioner practices, as the *Federal Register* is not received by that County's public library.

The Government's key witnesses, Commonwealth Agents Caroff and Emery, were permitted to testify as to hearsay statements allegedly made by Petitioner. These statements, if made, were self-incriminatory and in the nature of confessions. Reproduced as Appendices I and J are relevant portions of the direct testimony of Agents Caroff and Emery. The specific statements involved and argument with respect to them will be covered under heading I.

During jury summation, the Assistant U.S. Attorney engaged in inflammatory remarks, argued beyond the record, and misused evidence admitted for a limited purpose. Relevant portions of these closing remarks are reproduced as Appendix K to this Petition, and will be discussed under heading IV.

The trial court, in instructing the jury, charged as to the term "ultimate user" in an improper way (Appendix H, at 48a, lines 6-9) and included distribution in his charge even though he had previously ruled on two occasions that the element of distribution would be stricken from the case. (See Appendix H, at 50a, lines 28-34.) Further, the trial court improperly instructed on a controlled substance allegedly distributed by Petitioner, Phendimetrazine (the "pink pills"), even though they had not been included in the indictment, and were admitted into evidence for the limited purpose of showing intent. (Appendix H, at 52a, lines 24-30, at 53a, lines 1-23.) This point will be discussed under heading VII.

The facts developed at trial, as well as the indictment, establish that the only prescriptions for biphetamines allegedly issued by Petitioner that would be considered in violation of 21 U.S.C. § 841(a)(1)

were issued to the two agents. No evidence of widespread trafficking within the general public was alleged or provided. This will be covered under heading VI.

This Petition addresses itself to the prejudicial impact of the court's instructions, prosecutorial remarks, improperly admitted evidence, and evidence improperly utilized by the trial court and prosecutor, as well as significant questions of law involving the employment and interpretation of the Controlled Substances Act of 1970.

REASONS FOR GRANTING THE WRIT

Grant of the writ here sought is essential to review important questions of federal law heretofore undecided by this Court.

Specifically, there is a need for decision concerning whether the crime of unlawful dispensing of a controlled substance under 21 U.S.C. § 841(a)(1) requires the filling of a prescription, thus establishing the placement of the controlled substance in the hands of an "ultimate user" as defined in 21 U.S.C. § 802(25). Further, prosecutions of physicians under 21 U.S.C. § 841(a)(1) have been prevalent without regard to whether such physicians are really traffickers in drugs, or merely negligent in prescribing. There is a need for guidance from this Court in the application of 21 U.S.C. § 841(a), as opposed to 21 U.S.C. § 842(a)(1), as it applies to practicing doctors.

Review is further required to determine whether the courts below have properly decided important federal questions, such as the delegations and standards established under 21 U.S.C. § 811(a) and (b), and

whether the courts below have departed from principles announced by this Court in *Papachristou* v. *Jacksonville,* 405 U.S. 156 (1972).

This Court's supervisory power is called upon as well, in the areas covered by headings I, IV, and VII.

In short, the entirety of Petitioner's trial was tainted by substantial violations of his rights under the 4th, 5th and 6th Amendments, in addition to the essential questions of law otherwise raised.

Finally, the Third Circuit's opinion determines that, absent its construction of 21 U.S.C. § 802(25), constructive and attempted transfers of controlled substances would be read out of the term "deliver," as found in 21 U.S.C. § 802(8). This interpretation is contrary to 21 U.S.C. § 846 and the holding of the Seventh Circuit in *U.S.* v. *Green,* 511 F.2d 1062 (7th Cir. 1975). This conflict between the Seventh and Third Circuits on this point of law requires review and disposition by this Court.

I

The Testimony of the Two Government Witnesses, Commonwealth Agents Caroff and Emery, Contained Hearsay References to What Petitioner Allegedly Said. These References are Self-Incriminatory, and are in the Nature of Confessions. They Were Allegedly Made by Petitioner to the Agents Without His Having Received a Warning of Any Type. Further, the Only Method of Rebuttal of the Alleged Statements was for Petitioner to Take the Stand, or Leave the Statements Unrebutted. The Testimony Therefore was Offensive to Petitioner's 4th, 5th and 6th Amendment Rights.

Two of the Government's most important witnesses, Commonwealth undercover Agents Caroff and Emery,

were permitted, without objection or court interference, to testify as to numerous statements allegedly made by Petitioner.[1]

This testimony was hearsay of the most invidious kind, inasmuch as the statements purportedly made

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[1] ". . . he didn't want any mothers calling him up and raising hell with him." (App. I, at 55a, lines 7 and 8)
". . . not to take them to the same drug store." (App. I, at 55a, lines 14-15)
". . . make sure you don't take them to the same store because I don't want to get into trouble." (App. I, at 56a, lines 6-7)
". . . try to make these last a little longer." (App. I, at 56a, line 1)
"I hope you aren't taking these to the same drug store." (App. I, at 57a, lines 5-6)
"The Doctor replied no, it's too risky." (App. I, at 58a, lines 11-12)
"He said they are checking now . . . he said the federal agents." (App. I, at 58a, lines 13-15)
"If they see some more from the same address then I am in trouble." (App. I, at 58a, lines 27-28)
". . . better wait a couple of weeks." (App. I, at 58a, lines 31-32)
(App. I, at 59a, lines 7-19)
(App. I, at 59a, lines 9-27)
". . . it's too risky; the State Police are making photostats of my prescriptions and checking on me." (App. I, at 60a, lines 17-19)
". . . this isn't practicing medicine." (App. I, at 60a, line 30)
". . . you don't understand the trouble I can get into." (App. I, at 61a, lines 12-13)
"You don't understand the trouble I can get into. Don't you know there are Federal Narcotics agents, and they have an outfit something like the FBI." (App. I, at 61a, lines 22-26)
". . . you can drop me a letter and I will send you some prescriptions." (App. I, at 62a, lines 7-8)
". . . they'll be checking on me." (App. I, at 62a, line 18)
"come back" (App. J, at 63a, line 19)
". . . the black ones?" (App. J, at 63a, line 24)
". . . drugs were being watched." (App. J, at 65a, line 1)

by Petitioner were by their nature confessions, 18 U.S.C. § 3501(e), and were made without any warning consistent with *Miranda* v. *Arizona,* 348 U.S. 436 (1966), or succeeding cases.

That this point was not raised at trial is unimportant here, as it is of such vital importance, not only to Petitioner, but to all, as is emphasized by the Court's recent decision in *Brewer* v. *Williams,* —— U.S. ——, 97 S.Ct. 1232 (1977). *See also,* Federal Rules of Criminal Procedure, Rule 52(b); *U.S.* v. *Dunn,* 299 F.2d 548 (5th Cir. 1962). *Dunn, supra,* is a case factually similar to the one at hand, and pre-*Miranda.* Dunn and Darnell were indicted for violations involving fraud upon FHA. During investigation by the FBI, Darnell made incriminating statements, without proper warning, that established the guilt of Dunn. An FBI agent testified as to what Darnell had told him, without objection. The reviewing court considered the admission of this testimony to be plain error and ordered a new trial. *See also, Tatum* v. *U.S.,* 190 F.2d 612 (D.C. Cir. 1951); *U.S.* v. *Bates,* 512 F.2d 56 (5th Cir. 1975).

The importance of the Commonwealth's agents' testimony in the instant case is highlighted by the fact that it was the principal evidence placed before the jury concerning Petitioner's specific intent to commit the crime charged, with guilty knowledge, which are essential elements of that crime. 21 U.S.C. § 841(a). Its importance is further highlighted by the fact that in the Government's appeal brief to the Third Circuit, at page 8, Petitioner's alleged statement, "this isn't practicing medicine," (Appendix I, at 60a, line 30) appears in block letters.

The inclusion of these statements in the record was not only unnecessary and improper, but indeed, a violation of Petitioner's Fifth Amendment rights. The agents' testimony tended to have the effect of forcing Petitioner to take the stand to contradict that testimony. However, it is well established that under the Fifth Amendment a person may not be compelled to take the stand in his own defense. Petitioner's choices, then, were to allow the testimony to stand unrebutted, or to be compelled to take the stand to defend himself. A defendant cannot, under the Fifth Amendment, be forced to make such a choice. In *Michigan* v. *Tucker,* 417 U.S. 433 (1974), this Court inferred that *Miranda* and its forerunners, as well as subsequent cases, were designed to protect against compulsory self-incrimination. Mr. Justice Rehnquist, speaking for the Court, clearly stated that the failure to protect at one of the stages of the proceeding may make invocation of Fifth Amendment rights useless at a later stage (*Tucker, supra,* at 440-441). That is exactly what occurred here. Petitioner's right to silence at trial was vitiated by the unwarranted inclusion of hearsay in the agents' testimony.

In *California* v. *Green,* 399 U.S. 149 (1970), this Court stated that an out-of-court declaration may be admitted so long as the declarant is testifying as a witness and is subject to full and effective cross-examination. In this instance, the Petitioner was the out-of-court declarant. He could not be forced to take the stand either for the purpose of contradicting the statements testified to by the agents, or to be cross-examined thereupon. Although he could confront the agents by cross-examination, he could not be made to confront them with his best weapon, himself. *Douglas*

v. *Alabama*, 380 U.S. 415 (1965); *Nelson* v. *O'Neill*, 402 U.S. 622 (1971); *Harris* v. *New York*, 401 U.S. 222 (1971); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). Accordingly, Petitioner's Sixth Amendment rights to confrontation were denied.

It has been said by this Court that where hearsay that is constitutionally self-incriminating is not crucial or devastating, its admission will not raise inferences of Fourth, Fifth, or Sixth Amendment violations. *Dutton* v. *Evans*, 400 U.S. 74 (1970). In this case, it is clear that the evidence was crucial and devastating. It was in block letters in the Government's appeal brief to the Third Circuit. It was the only evidence at trial bearing significantly on specific intent and guilty knowledge, and the statement, "this isn't practicing medicine," was determinative of the principal issue to be decided by the jury. *See, U.S.* v. *Moore*, 423 U.S. 122 (1975).

Mr. Justice Rehnquist, in *Michigan* v. *Tucker, supra*, takes a backward glance (*Tucker*, at 439-440) through the reasons for the Fifth Amendment freedom from compulsory self-incrimination. That review has much application to the case at hand. It has been said that in *Tucker* this Court tended toward a revision of *Miranda* to a totality-of-circumstances test to evaluate a confession as to its voluntariness. *See, Confessions by the Accused: Does* MIRANDA *Relate to Reality*, 62 Ky. L.J. 794 (1973-74); *Jackson* v. *Denno*, 378 U.S. 368 (1964). If the totality-of-circumstances test is applied to the circumstances here to determine whether the confession or self-incriminating statements were voluntarily made, it cannot be said that Petitioner voluntarily incriminated himself to two

Commonwealth agents. Had he known they were agents and made the statements, they would have been preceded by appropriate warnings and, if still made, would therefore have been admissible as voluntary.

Applied to the circumstances described above, the case of *Mathis* v. *U.S.*, 391 U.S. 1 (1968), is instructive. *Mathis, supra*, involved a prosecution for knowingly filing false claims against the government on a tax return. While defendant was in state prison serving a sentence for an entirely different charge, he was visited by two government agents. Before eliciting any statement, they failed to give a *Miranda* warning. Strongly incriminating statements concerning the federal charges were made by defendant to the agents. The government claimed that defendant knew that his visitors were agents, that he was in custody, and that it was just a routine tax investigation. These defenses were considered shadowy, and Mathis' conviction was reversed, as his Fifth Amendment rights had been violated.

Contrary to the facts in *Mathis*, Petitioner did not know his "visitors" were Government agents. They never gave him any kind of warning. Therefore, to permit their testimony as to his allegedly "strongly incriminating" statements was unconstitutional, particularly in light of the *Mathis* holding. *See also, U.S.* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969), where failure to tell defendant that he was under criminal investigation and to advise him of his rights was the basis for suppressing self-incriminating statements. *U.S.* v. *Leahy*, 437 F.2d 7 (1st Cir. 1970); *U.S.* v. *Fruchtman*, 282 F. Supp. 534 (N.D. Ohio 1968), *cert.*

denied 400 U.S. 849 (1970); *U.S.* v. *Luxumberg,* 374 F.2d 241 (6th Cir. 1967).

The investigation involved, undercover in nature, and subsequent use of self-incriminating statements obtained during that investigation constituted a violation of Petitioner's Fourth Amendment rights. *See,* Shapiro, *Miranda Without Warning: Derivative Evidence as Forbidden Fruit,* 41 Brooklyn L. Rev. 325 (Fall 1974); *Massiah* v. *U.S.,* 377 U.S. 201 (1964). *Massiah* is especially significant. In that case, Massiah, who was indicted for violation of narcotics laws, made self-incriminatory statements to a co-defendant, who was wired for transmission. The statements were heard by an undercover agent who testified against Massiah at trial. The conviction was reversed by this Court on Fourth, Fifth and Sixth Amendment grounds. In the instant case the middleman was left out. Instead of a co-defendant to obtain the confidence of Petitioner, the undercover agents posed as patients who were referred by a physician. That the agent was not "wired" is not of significance, as he gained entry to Petitioner's practice utilizing guile similar to that employed in *Massiah.*

The use of self-incriminating statements in a criminal trial without the protections afforded by *Jackson* v. *Denno* through *Michigan* v. *Tucker* renders suspect Rule 804(b)(3) of the Federal Rules of Evidence. If Rule 804(b)(3) is interpreted in such a way as to be permitted to apply here, since Petitioner could not be called as a witness at trial without his consent and, therefore, might be considered "unavailable," an unconstitutional result will ensue. Therefore, Rule 804(b)(3) cannot be applied in this circumstance. It must be remembered that the Fourth,

Fifth, and Sixth Amendment rights are not only Petitioner's to assert but are rights that must be assured by the lower courts, this Court and the Government, unless waived actively, affirmatively and with knowledge of the consequences. 62 Ky. L.J. 794, *supra,* at 807; *Michigan* v. *Tucker, supra; U.S.* v. *Frazier,* 476 F.2d 891 (D.C. Cir. 1973). No such waiver is indicated on the record.

II

a) The Delegation by Congress to the Attorney General Permitting the Transfer of Controlled Substances Between Schedules III and II of 21 U.S.C. § 801, et seq., Permits the Attorney General, an Officer of the Executive, to Create a Crime, and Therefore Constitutes a Violation of Article 1, Section 1, of the U.S. Constitution.

Under our system of government, only the legislature can create a crime and prescribe penalties therefor. U.S. Constitution, Article 1, Section 1; *Cantwell* v. *Conn.,* 310 U.S. 296 (1940); *Smith* v. *Goguen,* 415 U.S. 566 (1974). Under 21 U.S.C. §811(a), Congress delegated power to the Attorney General to add drugs to the schedules contained in 21 U.S.C. §812, or to transfer drugs between schedules. We are not concerned here with the addition of drugs, as was the subject of the case of *Iske* v. *U.S.,* 296 F.2d 28 (10th Cir. 1968), relied upon by the Third Circuit. As a practical matter, though, drugs are usually added only after a full hearing. However, it is not necessary to hold a hearing to merely transfer drugs unless insisted on by an interested party. The transfer of biphetamines from Schedule III to Schedule II was not accompanied by a hearing (Appendix L, at 81a, lines 22-23).

Under 21 U.S.C. §842(a), a registrant, such as Petitioner herein, who distributes or dispenses a controlled substance in violation of §829, may be prosecuted as a misdemeanant or subject to a civil penalty of $25,000. Under §829(b) the distribution or dispensing of a Schedule III controlled substance may be accomplished without a written prescription, and refills are permitted over a six-month period, not to exceed five refills over said period. Under §829(a), a Schedule II controlled substance may be prescribed only by written prescription, and it may not be refilled.

The difference between a Schedule II and a Schedule III drug is meaningful from a penal point of view. The prescribing of a Schedule III drug in violation of §829 may lead to a misdemeanor prosecution or a civil penalty. Violation of the law as to a Schedule II drug may lead to a felony prosecution under §841(a). The situation which permits the Attorney General to transfer drugs between schedules, therefore, may lead to the elevation of a crime from a misdemeanor to a felony, thus involving statutory penalties previously inapplicable. This may not be done.

In *Cantwell, supra,* this Court found that a delegation to the Secretary of Welfare of Connecticut that enabled him to determine whether or not conduct was criminal and to invoke a penalty was an unconstitutional delegation of legislative authority. The same is true of *Papachristou* v. *Jacksonville,* 405 U.S. 156 (1972).

Applying the *Cantwell* and *Papachristou* holdings to this case results in the conclusion that Petitioner's

indictment and conviction under this statute must fall, because the statute is invalid as a violation of Article 1, Section 1, of the U.S. Constitution.

b) The Provisions of the Controlled Substances Act as to Classification and Reclassification of Drugs Are so Vague and Indefinite as to be Unconstitutional.

The standards for inclusion of controlled substances under Schedules II and III are set forth in 21 U.S.C. §812.

In its original enactment of the Controlled Substances Act, Congress classified biphetamines under Schedule III. These drugs have been on the market for over thirty years and have a currently acceptable medical use.

As a standard for inclusion under Schedule II, Congress set forth the test that

> (A) The drug or other substance has a high potential for abuse.
>
> (B) The drug or other substance has no currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.
>
> (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence. 21 U.S.C. §812(b)(2), Schedule II.

As a standard for inclusion under Schedule III, Congress set forth the test that

> (A) The drug or other substances have a potential for abuse less than the drugs or other substances in schedules I and II.
>
> (B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence. 21 U.S.C. § 812(b)(3), Schedule III.

At trial testimony was elicited from expert witnesses of both the defense and the Government, both Doctors of Pharmacology. Neither could point out the boundary line between the severe psychological dependence for Schedule II substances and the high psychological dependence required for a Schedule III classification. (Appendices L, at 85a, lines 17-20; and M, at 88a, lines 14-19.) The defense expert stated that the standards in the statute were generally vague and indefinite (Appendix M, *supra*), and this testimony went unrebutted.

Given the vagueness in the standards as established by both witnesses, especially as applied in what is in essence a criminal statute, prior decisions of this Court require a more extensive review. *Smith* v. *Goguen, supra; Cantwell, supra; Lanzetta* v. *New Jersey,* 306 U.S. 451 (1939).

III

Petitioner Should Not Have Been Convicted Of Violating A Law Of Which He Could Not Reasonably Have Had Notice.

The record stands uncontroverted that the means of disseminating information to physicians in Scranton, Pennsylvania, and Lackawanna County, regarding the transfer of controlled substances between schedules, are poor. The transfer of biphetamines from Schedule III to II was published in the *Federal Register*, and no other notice was provided. The testimony is clear and convincing, as well as unrebutted,

that the *Federal Register* is not a publication received in public libraries in Lackawanna County.

While ignorance of the law is no excuse, to enforce the statute as against Petitioner, as it involves transfer of substances between schedules, would be to enforce the laws of Caligula. *Screws* v. *U.S.,* 325 U.S. 91, 96 (1945). *See also, Jordan* v. *DeGeorge,* 341 U.S. 223 (1951); *U.S.* v. *Harriss,* 347 U.S. 612 (1954); *Parker* v. *Levy,* 417 U.S. 733 (1974); *Lambert* v. *California,* 355 U.S. 225 (1957); *Papachristou* v. *Jacksonville, supra.* This is especially true where the law, as this one does, requires guilty knowledge and specific intent.

IV

The Summation Of The Prosecution Was Inflammatory, Went Beyond The Record, And Used Evidence That Was Admitted Only For The Purpose Of Showing Intent For Another Purpose, And Thereby Invites Reversal, Despite Lack Of Objection, On The Grounds Of Plain Error And Violation Of Petitioner's Fifth And Sixth Amendment Rights.

During his closing argument, the Government prosecutor made several inflammatory remarks, and reached beyond the record.[2] Some remarks were ob-

[2] ". . . I submit [that a pill such as amphetamine] goes off like a bomb in your head and completely messes up all of your cardiovascular systems and otherwise." (App. K, at 69a, lines 6-10). No record support can be found for this statement of influence.

"I submit that if there were two people who could walk into an office . . . that absolutely don't need a diet, that it would be those guys." (App. K, at 70a, lines 9-13). No evidence as to their height and weight at the time of examination was before the jury.

"It amounts to the fact that for having put the whatever they call it on his arm for blood pressure and maybe the

jected to; others were not. That no objection was lodged is not a defense to this point. *Viereck* v. *U.S.*, 318 U.S. 236 (1943); *Berger* v. *U.S.*, 295 U.S. 78 (1935); *U.S.* v. *Garber*, 471 F.2d 212 (5th Cir. 1972); *U.S.* v. *Bates*, 512 F.2d 56 (5th Cir. 1975); *Henderson* v. *U.S.*, 218 F.2d 14 (6th Cir. 1955); *U.S.* v. *Gray*, 468 F.2d 257 (3d Cir. 1972). *See*, Alschuler, *Courtroom Misconduct by Prosecutor and Trial Judges*, 50 Tex. L. Rev. 629 (1972); Note, *Permissible Scope of Summation*, 36 Colum. L. Rev. 931 (June 1936); *People* v. *Powdwys*, 44 P.2d 377 (Cal. Ct. App. 1955);

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stethoscope, we are going to give him that one . . . and it is indicative of showing this Doctor's predisposition and activity and willingness to let these pills get out of his office without what anybody would refer to as an honest way of doing business in accordance with medical practice." (App. K, at 71a, lines 10-16.)

"[W]e are going to give him that one." (App. K, at 71a, line 33.)

". . . if they knew he was selling drugs like that . . ." (App. K, at 73a, lines 2-4.)

"[T]he girls couldn't be selling them in any more deviation from proper medical standard than he was doing himself." (App. K, at 73a, lines 7-8.)

Prosecutor instructed as to law and as to whether prescriptions must be filled to constitute the crime. (App. K, at 74a, lines 20-35.)

". . . he did everything in his power to turn these drugs loose on society . . ." (App. K, at 75a, lines 2-3.)

"[U]nless they happened to be some real healthy specimens—[they] could be in their grave as I am standing here talking to you know." (App. K, at 75a, lines 10-12.)

"And if it is found with some kid up in Nay Aug Park, that is where it is found. And if it is found at 909 Pittston Avenue, that is where it is found." (App. K, at 75a, lines 22-23.)

"And be he standing in Nay Aug Park with hair down to here or in his office—" (App. K, at 75a, lines 29-30.)

Kemph v. *Texas*, 464 S.W. 2d 112 (1971); *State* v. *Hawley*, 229 N.C. 167, 48 S.E. 2d 35 (1948).

A basic rule of summation forbids allusion in argument to any elementary proposition of fact that is not already in evidence. This is especially required in a criminal case, where life and liberty are at stake. 50 Tex. L. Rev., *supra*. *See also*, *Blackmun* v. *West Jersey Seashore R.R. Co.*, 68 N.J.L. 1, 52 A. 370 (1902); *Greenfield* v. *Kennett*, 69 N.H. 419, 45 A. 233 (1899); *State* v. *Clark*, 114 Minn. 342, 131 N.W. 369 (1911); *People* v. *Fielding*, 158 N.Y. 542, 53 N.E. 497 (1899). That requirement is so because a prosecutor has more influence on a jury than does the defense counsel. *DiCarlo* v. *U.S.*, 6 F.2d 364 (2d Cir.), *cert. denied* 268 U.S. 706 (1925).

In the case of *U.S.* v. *Starks*, 515 F.2d 112 (3d Cir. 1975), a tape was admitted into evidence as corroboration. The prosecutor in summation used the tape substantively. The Third Circuit in that case held that a new trial was mandated because of the improper use and instruction concerning the tape.

In the instant case, as will be discussed *infra*, some "pink pills" were admitted for a limited purpose, and so instructed upon. (Appendix H, at 50a, lines 9-25, at 51a, lines 16-29.) In argument, the prosecutor utilized the pills beyond the scope of the limited purpose for which they were admitted. (Appendix K, at 66a, lines 1-2, and at 67a, line 1.) *Starks*, *supra*, indicated reversal on this point alone. The Third Circuit, despite the obvious parallels in *Starks* to the case at hand, on Petition for Rehearing, did not consider this issue in a written opinion.

Referring to a defendant in a derogatory fashion as did the prosecution here in analogizing Petitioner to a "kid in Nay Aug Park" will often lead to reversal. In *People* v. *Hickman,* 34 A.D. 2d 831, 312 N.Y.S. 2d 644 (1970), the prosecutor, during summation, called defendant a "junky", a "rat", and a "sculptor with a knife." Defendant's conviction was reversed on Fifth Amendment grounds. In *People* v. *Kirkes,* 243 P.2d 816, *aff'd* 249 P.2d 1 (Cal. S.Ct.), where defendant was characterized as a "wolf at bay", there was a reversal for reference to facts not in evidence. A prosecutor, it has been said, may strike hard blows, not foul ones. *Viereck, supra,* at 248.

Another reason for reversing when a prosecutor has made remarks outside the scope of the evidence is suggested by *Taliaferro* v. *U.S.,* 47 F.2d 699 (9th Cir. 1931), cited favorably in *U.S.* v. *Bowser,* 532 F.2d 1318 (9th Cir. 1976), *cert. denied* —— U.S. —— (1977). Citing the case of *Lowdon* v. *U.S.,* 149 F. 673 (5th Cir. 1906), the Court in *Taliaferro* said that

> Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross-examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution . . . for he would by this procedure be debarred the right of cross-examination and be also deprived of the right of offering evidence in rebuttal. (*Taliaferro, supra,* at 702)

The Ninth Circuit in *Taliaferro, supra,* suggests a powerful Sixth Amendment objection to prosecutorial remarks outside of the record that deserves this

Court's attention. This concept was recognized in the case of *U.S.* v. *Spanglet,* 258 F.2d 338 (2d Cir. 1958). *See also,* Carlson, *Argument to the Jury and the Constitutional Right of Confrontation,* 9 Crim L. Bull. 293 (1973).

By making the statements noted in footnote 2, *supra,* the prosecutor went outside of the record and engaged in inflammatory remarks, thereby depriving Petitioner of Fifth Amendment due process of law and Sixth Amendment right to confrontation.

V

The Elements Of The Crime Charged Were Not Made Out At Trial

The case as submitted to the jury (Appendix H, *supra*) concerned whether or not Petitioner violated 21 U.S.C. § 841(a) by unlawfully dispensing a controlled substance. "Dispense," as defined by § 802(10), means "to deliver a controlled substance to an ultimate user. . . ." An ultimate user is defined in § 802 (25) as "a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household. . . ." Each and every element of the crime must be proved by the Government. The Third Circuit, in its Opinion, misapprehended the law when it found that the elements had been proved as alleged. The prescriptions were never filled. Absent filling, there could be no ultimate user, as defined in § 802(25), and hence no completion of the crime.

The legislature originally proposed to define ultimate user as follows:

> 'Ultimate user' means a person who lawfully *possesses* a narcotic or dangerous drug. . . . (S.

1895, 91st Cong., 1st Sess., April 1969; emphasis added.)

That definition was changed and enacted as it presently appears in 21 U.S.C. §802(25). It should be noted that it is the provision for actually possessing the drug that establishes the person as an ultimate user. In the final version of the legislation, this is recognized as "and who possesses", and is set off by commas. Therefore, it appears necessary for the prescription to actually be filled in order for there to be an "ultimate user." *Young* v. *Garrett,* 149 F.2d 223 (8th Cir. 1945).

The Circuit Court stated in its Opinion that, if this construction were permitted, it would violate the intent of Congress, inasmuch as constructive and attempted transfers would be read out of the definition of the term "deliver." 21 U.S.C. §802(8). However, this is not so, because 21 U.S.C. §846 makes it a crime to attempt any offense under the subchapter. Therefore, a prescription, even though not filled, would give rise to the same penalty thereunder. *U.S.* v. *Green,* 511 F.2d 1062 (7th Cir. 1975). Indeed, the opinion of the Third Circuit constitutes a variance from the holding in *Green, supra.* Of course, in this case, the lower court did not charge as to attempt, nor was Petitioner so indicted.

By failing to prove that the prescriptions were filled, and thereby failing to satisfy the element requiring an "ultimate user," there was a failure of proof at trial, as all the elements of the crime charged were not proved.

VI

Petitioner Is Not Within The Target Area Of The Statute.

An analysis of all the cases concerning prosecution under 21 U.S.C. §841(a) discloses that the courts were dealing with physicians who had patients lined up in the halls, under guard, and who were literally selling prescriptions or drugs. *See, U.S.* v. *Moore,* 423 U.S. 122 (1975). Drugs were distributed or dispensed to members of the community at large in most of the other cases. In this case, the only evidence of any dispensing was to two undercover Commonwealth agents. There was no evidence of widespread trafficking. *U.S.* v. *Larson,* 507 F.2d 385 (9th Cir. 1974); *U.S.* v. *Ellzey,* 527 F.2d 1306 (6th Cir. 1976); *U.S.* v. *Badia,* 490 F.2d 296 (1st Cir. 1973); *U.S.* v. *Green, supra; U.S.* v. *Rosenberg,* 515 F.2d 190 (9th Cir. 1975); *Young* v. *Garrett, supra; see,* oral argument of Paul L. Friedman, Asst. Solicitor General of U.S., in *U.S.* v. *Moore, supra,* Tr. at 20, 21, 45 and 46 (whether or not a physician is to be prosecuted under §841(a) is determined on a case-by-case basis, based upon whether the *violation is blatant*). It is submitted herein that for those violations not blatant prosecution or civil penalty was intended to be under §842(a)(1).

Therefore, Petitioner is not within the target area of the legislation, and should not be prosecuted under §841(a).

VII

The Court's Instructions To The Jury On The "Pink Pills" And The Term "Ultimate User" Were So Confusing And Improper As To Constitute Grounds For Reversal.

The trial court charged the jury as to the term "ultimate user," which charge was critical in this case because the definition of the term is a vital factor in determining whether or not a crime is committed. The court charged as follows:

> Ultimate user means a person who has lawfully obtained a controlled substance for his own use or for the use of a member of his household. (Appendix H, at 48a, line 7-9.)

The term's actual definition in 21 U.S.C. §802(25) varies from that charge, in that the court omitted the phrase "and who possesses."

Failure to instruct as to all the essentials of a crime, whether requested or not, is plain and reversible error. *Screws* v. *U.S.*, 325 U.S. 91 (1945); *Tatum* v. *U.S.*, 190 F.2d 612 (D.C. Cir. 1951); *U.S.* v. *Levy*, 153 F. 2d 995 (3d Cir. 1946); *U.S.* v. *Noble*, 155 F.2d 315 (3d Cir. 1946); *U.S.* v. *Max*, 156 F.2d 13 (3d Cir. 1946); *U.S.* v. *Yasbin*, 159 F.2d 705 (3d Cir. 1947); *U.S.* v. *Pincourt*, 159 F.2d 917 (3d Cir. 1947); *Samuel* v. *U.S.*, 169 F.2d 787 (9th Cir. 1948); *U.S.* v. *Gordon*, 242 F.2d 122 (3d Cir. 1957), *cert. denied* 354 U.S. 921 (1957); *U.S.* v. *Malfi*, 264 F.2d 147 (3d Cir. 1959).

The court's instruction as to the "pills" in the "brown bags" (Appendix H, at 50a, lines 10-11) was confusing. At first, the court stated that the pills in the bags were admitted on the issue of whether or

not Petitioner had the requisite intent to commit the crime (Appendix H, *supra*). The court then stated that the charge as to "ultimate user" was confined to the "pink pills." (Appendix H, at 53a, lines 13-23). The court also stated, in a sidebar conference, that it intended the ultimate user instruction to apply to the pink pills because they were delivered to the ultimate user (Appendix H, *supra*). But the court stated that there was no charge in the indictment as to the pink pills, and so instructed the jury. (Appendix H, at 50a, lines 19-22.) The court had dropped distribution from the case and stated that it was going to charge only on dispensing (Appendix H, *supra*). Yet it linked the pink pills to distribution in its charge, demonstrating that the court was confused (Appendix H, at 46a and 53a). If the court was so obviously confused, it is apparent that the jury also must have been confused. This constitutes plain error under the cases previously cited.

Finally, by restricting its charge on ultimate user to the pink pills, the trial court totally failed to charge as to the biphetamines. This is reversible error under the cases previously cited, as well as under *U.S.* v. *Laverick*, 348 F.2d 708 (3d Cir. 1965).

The final proof that both the court and the jury were confused by the instructions may be found in the judgment itself (Appendix F). This Court should note that the conviction was for both distributing and dispensing despite the trial court's ruling that distribution was dropped from the case (Appendix H, *supra*). In addition, the conviction recognizes a violation of 18 U.S.C. §2(b), even though the court dropped that count of the indictment from the case (Appendix H, at 95a, lines 8-11). In short, Petitioner

has been convicted for two charges not contained in the indictment as presented to the jury. He was therefore convicted of two crimes for which he was not charged, in violation of his Fifth Amendment rights. *See, U.S. v. Starks,* 515 F.2d 112 (3d Cir. 1975).

The multiplicity of error summarized in this Petition warrants the review sought. The fact alone that Petitioner has been convicted of two crimes beyond the submission of the case to the jury invites attention. Any one of the points raised herein singly would suffice, but taken together as a whole, the matter compels scrutiny by this Court. Therefore it is respectfully urged that this Petition be granted, and a Writ of Certiorari issue.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 74-204 Criminal

United States of America v. Patrick L. Tighe

Memorandum

This memorandum is in support of this court's orders denying the defendant's motions for a judgment of acquittal and for a new trial.

Defendant, a physician, was indicted and convicted on charges that he did "knowingly, willingly, unlawfully, and intentionally distribute and dispense a controlled substance, that is, biphetamine, a Schedule II controlled substance on eighteen occasions between November 26, 1973 and May 29, 1974." There was evidence that he sold prescriptions to undercover agents in violation of 21 U.S.C.A. § 841 (a)(1), Section 401 of the Drug Abuse Prevention and Control Act of 1970 (the Act).

A. *Motion for Judgment of Acquittal.*

Defendant advanced eight[1] reasons, any of which, he contended, would mandate his acquittal. They will be discussed *seriatem.*

1. "Defendant is a licensed physician and is, therefore, not subject to prosecution under the sections of the Controlled Substances Act charged in the indictment."

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[1] He listed nine reasons in his motion but consolidated the last two in his brief.

It is is [sic] now settled that a physician may be prosecuted under this section of the Act. United States v. Moore, 1975, 423 U.S. 122.

2. "An essential element of the crime charged is lacking under the evidence, to wit: The government failed to show that any ultimate user ever obtained possession of a controlled substance pursuant to the prescriptions issued by defendant."

The evidence showed that none of the prescriptions written by the defendant that formed the basis for the prosecution were ever presented to a pharmacist to be filled. Defendant contended that since this is an element of the offense, no crime has been committed. The court holds that in the prosecution of a physician for the sale of a prescription, it is not necessary that the Government show that the prescription was filled. *See* Jin Fuey Moy v. United States, 1920, 254 U.S. 189.

Section 841 (a)(1) of Title 21, U.S.C.A., provides that it is unlawful "to manufacture, distribute, or dispense. . . . a controlled substance." The court charged the jury that they should decide whether the defendant acted to "dispense" a controlled substance in order to convict. It is conceeded [sic] by the Government that the eighteen counts of the indictment each charge the same operative act—the issuance of a prescription.

Under 21 U.S.C.A. § 802, the following terms are defined:

> "(10) The term 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term 'dispenser' means a practitioner who so delivers a controlled substance to an ultimate user or research subject."

> "(8) The terms 'deliver' or 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship."
>
> "(25) The term 'ultimate user' means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household."

Defendant argues that in order for there to have been a dispensation of the controlled substance, an ultimate user must have been put in actual possession of the drug. *But see* United States v. Bloom, 2 Cir. 1947, 164 F. 2d 556, *cert. denied* 1948, 333 U.S. 857; *cf.* United States v. Brandenburg, 3 Cir. 1946, 155 F. 2d 110, *after retrial,* 3 Cir. 1947, 162, F. 2d 980, *cert. denied* 1947, 332 U.S. 769. This may be so if delivery is charged to have been made by "actual . . transfer" of the controlled substance, but the same section provides that the transfer may be constructive or attempted. When delivery has been accomplished by these means, the ultimate user need not be placed in actual possession. *Cf.* United States v. Bartee, 10 Cir. 1973, 479 F. 2d 484.

Here, the evidence showed that the defendant accomplished both a constructive and an attempted delivery of the drugs.

> " '. . . The classical legal elements of an "attempt" are the intent to commit a crime, the execution of some overt act in pursuance of the intention and a failure to consummate the crime,' United States v. Baker, [D.] D.C., 129 F. Supp. 684 (1955),' . . . there must be some appreciable fragment of the crime committed, it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and the act must not be equivocal in nature. * * *,' People v. Buffum, 40 Cal. 2d 709, 256 P.

2d 317." Rumfelt v. United States, 7 Cir. 1971, 445 F.2d 134, 136. *cert. denied* 1971, 404 U.S. 853.

Constructive possession requires simply the "power to exercise dominion and control" over the controlled substance. United States v. Crippen, 3 Cir. 1972, 459 F. 2d 1387. Here the defendant, a licensed physician, gave the agents prescriptions with the intention that they be filled at a drug store. The prescriptions directed the pharmacist to give a specific quantity of an amphetamine compound to the person named thereon. Presentation at any prescription counter in the area would have entitled the agents to immediate possession of the biphetamine tablets. Thus, the defendant did as much as he could do to put the agents in actual possession of the drugs, and there was nothing to prevent the latter from the exercise of dominion and control over them. Accordingly, the defendant accomplished both a constructive and attempted transfer of the drugs, as charged in the indictment and as proved at the trial.[2]

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[2] Although he did not raise the point in his motion, defendant, in his brief, seemed to imply that the court's charge was in error because it characterized the conduct charged as distribution rather than dispensation. *But cf.* United States v. Moore, supra, at 133-35. According to the statute, "The term 'distribute' means to deliver (other than by administering or dispensing) a controlled substance. . . ." 21 U.S.C.A. § 802(11). The defendant did not object to this following the charge. Moreover, if in error, this portion of the charge did the defendant no harm because of the totality of the court's instructions: the indictment charged both types of transfers, and the operative word for both is "delivery", and the court correctly defined that term. Finally, the overwhelming evidence of guilt makes harmless any error in the court's charge.

[3] The Act authorizes the Attorney General to delegate any function under it to any employee of the Department of Justice. 21 U.S.C.A. § 871(a). He has exercised this authorization, and functions under the Act have been assigned to the Administrator of the Drug Enforcement Administration (formerly Bureau of Narcotics and Dangerous Drugs). 28 C.F.R. § 0.100. This has been held to be proper. United States v. Benish, W.D. Pa. 1975, 389 F. Supp. 557, *aff'd* 3 Cir. 1975, 523 F. 2d 1051, *cert. denied* 1975, 44 USLW 3501 (No. 75-843).

3. "The provisions of the statute which establish the schedule of controlled substances, particularly as they purport to differentiate between Schedule II and Schedule III are so vague and indefinite as to be unconstitutional."

The Act classifies drugs in five schedules, based upon certain findings. The findings required for Schedules II and III are:

"(2) Schedule II.—

"(A) The drug or other substance has a high potential for abuse.

"(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

"(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

"(3) Schedule III.—

"(A)The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

"(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

"(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence." 21 U.S.C.A. § 812.

Defendant's attack was based, not upon the contention that the statute did not give him proper notice, but upon the argument that it did not provide sufficiently concise stand-

ards for the decision maker to determine in which schedule to classify a controlled substance. The due process clause of the Fifth Amendment "requires legislatures to set reasonably clear guidelines . . . in order to prevent 'arbitrary and discriminatory enforcement.' " Smith v. Goguen, 1974, 415 U.S. 566, 572-73 (footnote omitted).

Defendant stressed the inability of the Government's expert witness to distinguish "high psychological dependence" from "severe phychological [sic] dependence", and "high potential for abuse" from "less than high potential for abuse." But this does not support the defendant's proposition, since the witness qualified as an expert in pharmaceutical chemistry and not medicine. His testimony was that such decisions were matters of "weighed medical judgment" and "weighed judgment . . . between medical findings and the Drug Enforcement Administration." That such decisions would require medical expertise is not contradicted by the inability of the defendant's own expert to distinguish the same categories since the latter also qualified as a pharmacologist rather than as a medical doctor.

It is important to note that the statutory scheme treats the characteristics of the controlled substances in a continuum. In order to be classified as a controlled substance in *any* schedule, there must be a finding that the drug has some potential for abuse. 21 U.S.C.A. § 811 (a)(1)(A). The term, potential for abuse, has been the subject of litigation and has been defined as:

> ". . . such depressant or stimulant effect on the central nervous system as to make it reasonable to assume that there is a substantial potential for the occurrence of significant diversions from legitimate drug channels, significant use by individuals contrary to professional advice, or substantial capability of creating hazards to the health of the user or the safety of the community." Carter-Wallace, Inc. v. Gardner, 4th Cir. 1969, 417 F.2d 1086, 1090, (footnote omitted); *adopted in* Hoffman-La

> Roche, Inc. v. Kleindienst, 3 Cir. 1973, 478 F. 2d 1, 6; *see* H.R. Rep. No. 130, 89th Cong., 1st Sess. 7 (1965).

Once a drug has been found to have such a potential, it is placed into one of five schedules based upon a finding as to three criteria—potential for abuse, medical use, effect of abuse. The schedules embody an orderly pattern for the classification of drugs. Viewed in this context, it is clear that the statute sets forth with appropriate precision the standards for the schedules of controlled substances.

4. "The authorization given the Attorney General by the statute to reclassify controlled suubstances between the various schedules of the act constitutes an improper delegation of the legislative power of Congress."

In 21 U.S.C.A. § 812 (a), Congress initially classified "Amphetamine, its salts, optical isomers, and salts of its optical isomers" as a Schedule III controlled suubstance. Section 811 gives the Attorney General power to add drugs to or reclassify the drugs in the statutory schedules:

> "(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. . . . [T]he Attorney General may by rule—
>
> (1) add to such a schedule or transfer between such schedules any drug or other substance if he—
>
> (A) finds that such drug or other substance has a potential for abuse, and
>
> (B) makes with respect to such drug or other substance the findings prescribed by subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; . . . ."

Pursuant to this authority, amphetamine has been reclassified as a Schedule II controlled substance. Defendant attacked this as an unconstitutional delegation of legislative power.

The Court, in Youngstown Sheet & Tube Co. v. Sawyer, 1952, 343 U.S. 579, 588-89, held that the Constitution vests in Congress "exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution 'in the Government of the United States, or any Department of [sic] Officer thereof.' " Therefore, the issue is whether to cloak the Attorney General with authority to transfer substances between schedules unconstitutionally delegates the exclusive authority of Congress.

Frequently Congress passes broad standards for administrative action. These standards provide the framework within which regulations are promulgated. Wide latitude must be allowed in order to deal effectively with the complex and changing economic, social and scientific components of modern life.

> ". . . The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. Private rights are protected by access to the courts to test the application of the policy in the light of these legislative declarations. . . ." American Power Co. v. SEC, 1946, 329 U.S. 90, 105.

Statutes are unconstitutional if they purport to delegate unfettered discretion in rule making to the executive. A.L.A.

Schechtor Poultry Corp. v. United States, 1935, 295 U.S. 495. But a statute will be upheld if it "defines the policy of Congress and establishes standards within the framework of which the administrative agent is to supply the details." Currin v. Wallace, 1939, 306 U.S. 1, 18. *Accord*, Sperry v. Florida, 1963, 373 U.S. 379; Yakus v. United States, 1944, 321 U.S. 414. This principle is applicable to rules whose violation results in criminal penalties. United States v. Grimaud, 1911, 220 U.S. 506; United States v. Berrigan, 3 Cir. 1973, 482 F. 2d 171. Delegations of authority to regulate drugs have generally been sustained even though they involve broad standards of discretion due to the discovery and introduction of new drugs at an unprecedented rate and the alteration in methods of abuse. Iske v. United States, 10 Cir. 1968, 396 F. 2d 28; White v. United States, 1 Cir. 1968, 395 F. 2d 5, *cert. denied* 1968, 393 U.S. 928.

Here, the statute is not an unconstitutional delegation. It requires the Attorney General to act after consultation with the Secretary of Health, Education and Welfare and to hold hearings pursuant to the rule making procedures prescribed by 5 U.S.C.A. §§ 551 *et seq.* 21 U.S.C.A. § 811. Moreover, the statute sets forth factors determinative of control or removal from schedules:

> "(c) In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:
>
> "(1) Its actual or relative potential for abuse.
>
> "(2) Scientific evidence of its pharmacological effect, if known.
>
> "(3) The state of current scientific knowledge regarding the drug or other substance.

"(4) Its history and current pattern of abuse.

"(5) The scope, duration, and significance of abuse.

"(6) What, if any, risk there is to the public health.

"(7) Its psychic or physiological dependence liability.

"(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter." 21 U.S.C.A. § 811(c).

Accordingly, the statute is constitutionally sufficient since is delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.

5. "The findings required under the statute to transfer biphetamines from Schedule III to Schedule II were never made by the Bureau of Narcotics and Dangerous Drugs and hence the reclassification is invalid."

As previously noted, under Section 812 as passed by Congress, compounds which contained "[a]mphetamine, its salts, optical isomers, and salts of its optical isomers" were Schedule III controlled substances. The provisions governing lawful delivery of Schedule III substances and the penalties for unlawful delivery differ from those imposed upon the delivery of Schedule II substances. *E.g., U.S.C.A.* §§ 829, 841. At trial, it was proved that defendant sold prescriptions for biphetamine, a drug containing amphetamine. Under the Federal Regulations in effect at the time, amphetamine compounds had been reclassified as a Schedule II controlled substance. 21 C.F.R. § 1308. In order for the Attorney General to reclassify drugs, certain findings must be made. 21 U.S.C.A. § 811. Defendant's contention in this regard was that the findings necessary for the reclassification of biphetamines from Schedule III to II were never made.

Defendant conceded that in the reclassification of amphetamines as a group the appropriate findings were made. Defendant's Brief on Motion for Judgment of Acquittal at 10; *See* 36 F.R. 12734 (1971). He argued, however, that since biphetamines were excluded from the amphetamine compounds transferred to Schedule II on July 7, 1971, their later restoration to the general amphetamine group without additional findings was improper. 36 F.R. 13686 (1971).

This logic ignores the plain wording of the July 7 order. The crucial portion did not exclude biphetamines from the appropriateness and applicability of the *findings* it announced with regard to amphetamine compounds. Rather, since Pennwalt Corp., the manufacturer of biphetamines, had requested a hearing on the reclassification of its drug, the order reserved the applicability of the *reclassification* to biphetamines during the pendency of the requested hearing. 36 F.R. supra, at 12736. Thus, while biphetamines were found to be in a group with Schedule II criteria, they were temporarily held in Schedule III. When the reservation was rescinded and biphetamines restored on July 23 as a result of the withdrawal of the request for review by the manufacturer, no new findings were necessitated as they had already been made on July 7. Moreover, there would have been no reason to make new findings inasmuch as no new evidence had been presented to the factfinder.

Accordingly, since the findings required by 29 U.S.C.A. § 811 were properly made and published on July 7, 1971, the reclassification of biphetamines from Schedule III to II was valid.

6. "The Bureau of Narcotics and Dangerous Drugs having issued an order transferring biphetamines to Schedule II, failed thereafter to publish this classification on a semi-annual basis as required by the statute."

Section 812, 21 U.S.C.A., created the initial classifications of controlled substances; it provides that schedules shall be "updated and republished on a semi-annual basis during

the two-year period one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter." *Id.* The Act was enacted on October 27, 1970. Pub.L. 91-513, 84 Stat. 1236, 1970 U.S. Code Cong. and Admin. News 1437, 1508.

It has been held that this requires publication of the schedules during the four six-month periods which commenced on October 27, 1971. United States v. Nocar, 7 Cir. 1974, 497 F. 2d 719, *cert. denied* 1974, 419 U.S. 1038. Thus, the first publication, effective April 27, 1972, was made in the Federal Register published on May 12, 1972.[4] 37 F.R. 9545 (1972). This satisfies the statutory requirement. United States v. Nocar, supra.

The plain language of the statute does not require semiannual republications of the schedules each time they are revised. Rather, the entire schedules, whether or not there have been amendments, must be published semiannually during the second and third year after enactment and annually thereafter. Thus, since changes in the schedules are not required by the statute to be republished semiannually, defendant's contention in this regard is unavailing.

7. "The government failed to introduce evidence that defendant issued the prescriptions involved in any manner outside the proper course of medical practice."

It was stipulated at trial that the defendant was licensed under the Act. He was, therefore, a "practitioner" as that term is defined. 21 U.S.C.A. § 802 (20). In order to convict a practitioner of a violation of 21 U.S.C.A. § 841, the Government must show that he acted outside the course of his professional practice or research. United States v. Moore, supra, 423 U.S. at 141. Evidence demonstrates that a practitioner acted outside the course of his practice when it shows that:

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[4] Copies of the Federal Register may be obtained locally at the King's College (Wilkes-Barre, Pa.) library, which is a depository of federal documents. See 44 U.S.C.A. § 1905 *et seq.*

> "... [H]e gave inadequate physical examinations or none at all. He ignored the results of the tests he did make. He did not give methadone [the controlled substance which formed the basis of the indictment] at the clinic and took no precautions against its misuse and diversion. He did not regulate the dosage at all, prescribing as much and as frequently as the patient demanded. He did not charge for medical services rendered, but graduated his fee according to the number of tablets desired. In practical effect, he acted as a large-scale 'pusher'—not as a physician." United States v. Moore, supra, 423 U.S. at 142-43.

In United States v. Bartee, 10 Cir. 1973, 479 F. 2d 484, the Court held that a physician could be held criminally liable for conduct outside the course of professional practice and not for a legitimate circumstance on the basis of expert testimony. "However, the jury is not bound by such expert testimony and may of course consider all of the facts and circumstances surrounding the [defendant's] prescribing as related by lay witnesses." United States v. Bartee, supra, 479 F. 2d at 488. Here, the Government offered evidence that except on a few occasions, defendant did not engage in even the most rudimentary medical examination before prescribing Biphetamine-20[5] for his patients. This was contrary to standard medical practice as it was testified to by the Government's expert witness.

In commenting on *Bartee*, the Court in United States v. Larson, 9 Cir. 1974, 507 F. 2d 385, 387-88, propounded the following factors as relevant:

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[5] The evidence showed that Biphetamine-20 contained the greatest amound [sic] of amphetamine (10 m.g.) and dextroamphetamine (10 m.g.) of any Biphetamine compound. Lesser strengths were Biphetamine-12+½ and Biphetamine-7+½. The package insert for Biphetamines indicated that "... amphetamines should be administered at the lowest effective dosage, and dosage should be individually adjusted." The maximum recommended dosage for obesity, Biphetamine's only known use, was one tablet daily.

1. Whether the physician prescribed inordinate quantities of controlled substances;

2. Whether he wrote more than one prescription on occasions in order to spread them out;

3. Whether the fee charged was based on the number of prescriptions or the amount of controlled substance supplied;

4. Whether he cautioned his patient-customers to be careful to avoid drawing the attention of investigators of the Bureau of Narcotics and Dangerous Drugs;

5. Whether he used street parlance or slang to refer to the medicient he was prescribing; and

6. "Finally, [whether] some of the utterances that . . . witnesses testified that [the defendant] had made, in view of the previously listed facts and circumstances support the jury's determination that [the defendant] was not acting for a legitimate medical purpose or in the usual course of his professional practice." United States v. Larson, supra, 507 F. 2d at 388.

Applying these factors, the evidence showed that the defendant sold up to three prescriptions, each for 32 40 tablets of Biphetamine-20, to one narcotics agent for his use during a sixteen day period, November 19-December 5, 1973. Defendant continued to sell multiple prescriptions to the undercover agents for five to six months. Expert testimony established this to be in excess of proper medical treatment. This finds support in a statement attributed directly to the defendant by an undercover agent: "[T]his [the sale of prescriptions for amphetamines] isn't practicing medicine."

While the defendant did not write more than one prescription per person on any single occasion, he wrote prescriptions in three different names at one time. Three was the maximum number of prescriptions he would sell, however, although once he added four packets each of which contained 32 tablets of Phendimetrazine (another stimulant and Schedule III controlled substance). Finally, on one occasion, the defendant postdated at least one of several prescriptions he delivered to the undercover agents.

The fees charged by the defendant began at $8.00 for one prescription of 32-40 tablets of Biphetamine-20, $12.00 for two such prescriptions, and a negotiable fee of $15-$20.00 for three prescriptions. On the occasion when he delivered the additional 128 tablets of Phendimetrazine charged $15.00 for the three prescriptions he had written and an additional $5.00 for the pills.

The defendant manifested a consciousness of the drug enforcement structure and an awareness that his conduct could lead to criminal liability if it were discovered by police. He cautioned the agents not to take the prescriptions to the same drug stores. He instructed the agents that if they were themselves dispensing the drugs he prescribed for them, they should place them in different containers so that the drugs could not be traced back to him. Finally, the agents testified that when they asked for more prescriptions, the defendant refused and said—not that such a procedure was at variance with proper medical practice—but "it's too risky."

There was evidence that the defendant used street parlance by referring to the Biphetamine-20 tablets which he prescribed as "the black ones."

Finally, the defendant prescribed the highest strength dosage of an amphetamine preparation for individuals who, he believed, had never been examined by him or any other physician to determine whether any of the myriad of reasons not to prescribe amphetamines applied. He continued to sell prescriptions for this narcotic after being told that the persons in whose name he issued the prescriptions were themselves disposing of the prescribed drugs to third persons. Each of these, in conjunction with the factors above

supports the proposition that the defendant was not acting for a legitimate medical purpose or in the usual course of his medical practice.

In summary, there was ample evidence from which the jury could find that the defendant was a conscious instrument in the "diversion of drugs from legitimate channels to illegitimate channels." United States v. Moore, supra, 423 U.S. at 135.

8. "The government failed to keep minutes of the grand jury proceedings and as a result, defendant was deprived of a fair trial. The evidence adduced at the trial clearly showed that the indictment was based upon the testimony before the grand jury of only one witness, who admittedly according to the government testimony, had no knowledge of the facts upon which the indictment was based."

There is no requirement than [sic] an indictment be based on direct rather than hearsay testimony. United States v. Newcomb, 5 Cir. 1974, 488 F.2d 190. While permissable [sic], *see* Rule 6, Fed.R.Crim.P., and while probably desirable, *see* United States v. Aloisio, 7 Cir. 1971, 440 F. 2d 705, *cert. denied* 1971, 404 U.S. 824, there is no requirement that grand jury testimony be recorded. United States v. Heckman, 3 Cir. 1973, 479 F. 2d 726. Furthermore, there is no reason to speculate that the grand jury was misled into believing it was hearing direct rather than hearsay testimony or that had the grand jury heard direct testimony, there is a high probability that it would not have indicated [sic]. *See* United States v. Leibowitz, 2 Cir. 1969, 420 F. 2d 39.

B. *Motion for a New Trial.*

The trial ended on June 5, 1975, and this motion was filed on June 10, 1975, and received by the court one day later. Rule 33 of the Federal Rules of Criminal Procedure requires that a motion for a new trial be filed within seven days of the trial or "within such further time as the court may fix during the 7-day period." To comply with this Rule,

the grounds asserted by the defendant as a justification for the new trial must be filed within the same time period. United States v. Newman, 3 Cir. 1972, 456 F. 2d 668; United States v. Mathews, W.D. Pa. 1971, 335 F. Supp. 157, *app. dism.* 3 Cir. 1972, 462 F. 2d 182, *cert. denied* 1972, 409 U.S. 896. Defendant's original motion was filed within the period; however, the pleading labeled "Additional Reasons for a New Trial" was not. Since it was not timely, and since the defendant did not secure the court's permission within the time period to make a late filing, the court is without power to grant a new trial on grounds asserted in the later pleading. United States v. Newman, supra. Therefore the court will not rule upon the additional reasons to the extent they do not overlap the grounds put forward in the original motion.[6]

[6] The court did consider the additional reasons, and it is the opinion of the court that they are without merit.

Reasons 8 and 9 relate to the packets of Phendimetrazine, which were the subject of a limiting instruction by the court that adequately explained the purpose for their admission. The defense counsel consented to the portion of the court's charge attacked by reason 10. Reason 11 arises from a reference by the Assistant United States Attorney in his rebuttal to a list of controlled substances which he said that a witness had testified to the effect that the list had been sent to all registrants such as the defendant. Defense counsel interposed an objection on the ground that this testimony had been ordered stricken. There is some question as to whether, in fact, the testimony had been admitted into evidence, *compare* n.t. 264 (direct examination, testimony that list was sent) with n.t. 267 (cross examination, objection to testimony concerning whether list sent sustained). However, the court cured any erroneous reference by its immediate instruction to the jury to the effect that if they recalled that the testimony had been stricken, they should disregard the portion of the argument which drew this objection. United States v. Maenza, 7 Cir. 1973, 475 F.2d 251.

Reason 12-a overlaps the sixth and seventh grounds of the original motion and are completely discussed in the text of the memorandum. Reason 12-b apparently refers to the prosecutor's comment on the failure of the defendant's character witnesses who

The first ground asserted in the original motion is the failure of the court to grant a motion for acquittal at the conclusion of the Government's evidence and at the conclusion of all the evidence. Since the evidence overwhelm-

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were medical doctors to contradict the Government's expert witness on the proper medical practice with respect to biphetamines. This comment, if in error, came in without objection by defense counsel. *See* United States v. Webb, 5 Cir. 1972, 463 F. 2d 1324, and could not have affected the outcome of the case, given the strong showing of guilt.

Reason 12-c refers to a comment by the Assistant United States Attorney which drew an objection that was sustained.

> ". . . [I]f there is a problem we have in this country it has got to be drug abuse, and if we are to even participate in the fiction that we are going to do anything about it, we would have to put a stop to it wherever it may be found.
>
> "And if it is found with some kid up in Nay Aug Park, that is where it is found. And if it is found at 909 Pittston Avenue, that is where it is found.
>
> "I am not the one, he is not the one that decided, these agents aren't the ones who decided the locality of where this crime was going to be committed. None of us decided what educational background you had to have in order to complete the elements of this offense. The law did that.
>
> "And be he standing in Nay Aug Park with hair down to here or in his office—" Transcript of Government's Closing Statement, at 46-47.

The objection was sustained, however, because the prosecutor had begun a line of argument—that the law was to be applied equally to "hippies" and to respected members of the community—which might have injected an issue not a part of the case. Jurors are not expected to leave their common sense at the courtroom door and could not have understood this comment to stigmatize the defendant as being someone with long hair. There was no factual issue before the jury involving unequal application of the law, and to have completed such an argument might have tended to confuse the jury. After the objection was sustained, the prosecutor did not pursue the potentially prejudicial line. Accordingly, there was no error.

ingly pointed to the fact that the defendant committed the acts of which he stood accused, the motion on this ground will be denied.

The second and third grounds are that the verdict was contrary to the weight of and not supported by the evidence. As indicated above, the court is not convinced of either.

The fourth ground asserts that the Government failed to show that the defendant acted in a manner other than in the proper course of medical treatment. As noted above, the Government introduced qualified expert testimony on proper medical treatment and produced eyewitnesses who testified to the conduct of the defendant which the jury could find to be a departure from this standard. Accordingly, this ground will not support the motion.

The fifth ground, concerning whether issuance of the prescriptions constituted a sufficient transfer for culpability under the statute is more fully discussed in the portion of this memorandum dealing with the motion for acquittal and is insufficient here too.

In the sixth and seventh grounds the defendant charges that Government counsel prejudiced the defendant by comments on the defendant's failure to pursue the defense of entrapment and that the court should have granted a mistrial and should now grant a new trial.

The following portion of the Government's closing argument drew an objection and was here attacked by this motion:

> "These witnesses testified as to what happened to the best of their recollection. On cross-examination Mr. McGlone can ask them any question he likes within the broadest margin of relevancy as to what happened, what didn't happen, what was said, what wasn't said, whether the witness is biased, whether he went in there for the purpose, whether he went in there with a

grudge, whether he went in there for some kind of malicious reason to frame the doctor or anything like that.

"Cross-examination in this case, Ladies and Gentlemen, of these agents was absolutely negligible." Transcript of Government's Closing Statement, at 22.

The law allows counsel some degree of latitude in arguing their cases to a jury. However, it is prejudicial and can be grounds for a new trial for the prosecutor to comment on the failure of a defendant to take the stand. Griffin v. California, 1965, 380 U.S. 609. This rule grows out of the right against self-incrimination, however, Const. Amend. 5, and the statement of a prosecutor not otherwise improper, *see* United States v. LeFevre, 3 Cir. 1973, 483 F. 2d 477, commenting upon some portion of the defendant's case such as the failure to call a potentially helpful witness does not mandate a new trial unless the comment "can be construed as a comment upon the failure of the defendant to testify." United States v. Keller, 3 Cir. 1975, 512 F. 2d 182, 186 (emphasis in original).

In the quoted portion of his closing statement, the Assistant United States Attorney did not make a comment upon the defendant's failure to take the stand and pursue the defense of entrapment; he was simply bolstering the credibility of the eyewitnesses to the crimes—two undercover agents who bought drugs and prescriptions from the defendant—by pointing out to the jury that the defense counsel on cross examination, had failed to bring out any facts upon which might make their direct testimony less believable. Credibility is always at issue during the trial, and it is within province of the jury to disbelieve any witness's testimony. Furthermore, on cross-examination, the defendant mounted an attack on the credibility of at least one of the eyewitnesses. The prosecutor's comment went to the failure of that attack. *See* United States v. Adamo, 3 Cir. 1976, 534 F. 2d 31.

Moreover, if the prosecutor's comment is seen as a comment upon the failure of the defendant to develop a defense of entrapment, he limited his argument to the defendant's cross-examination of Government witnesses. *See* United States v. Dansker, 3 Cir. 1976, 75-1685 (filed June 2, 1976). Any inference with regard to the failure of the defendant to take the stand or to put forward an entrapment defense does not logically arise from this comment, and the court's charge made this clear to the jury.

Thus the court is satisfied that the closing arguments of the United States Attorney did not inject unlawful prejudice into these proceedings.

/s/ MICHAEL H. SHERIDAN
Chief Judge
Middle District of Pennsylvania

Dated: August 13, 1976.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1847

UNITED STATES OF AMERICA

v.

PATRICK L. TIGHE, *Appellant*
(D. C. Crim. No. 74-204)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Argued January 6, 1977
Before VAN DUSEN and ADAMS, *Circuit Judges*,
and WEINER, *District Judge*•

Paul A. McGlone, Esq.,
Scranton, Pa.,
Attorney for Appellant

S. John Cottone, U. S. Attorney;
Lawrence M. Kelly, Assistant
U. S. Attorney;
Scranton, Pa.,
Attorneys for Appellee

• Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion of the Court

(Filed February 25, 1977)

VAN DUSEN, *Circuit Judge.*

The issue in this case is whether dispensing of a prescription for a controlled substance outside the usual course of professional practice [1] constitutes dispensing or possession of that substance with intent to dispense under the Controlled Substances Act (CSA), 84 Stat. 1242, 21 U. S. C. § 801 *et seq.*, including § 841(a)(1). We hold that it does.

I.

Defendant Patrick L. Tighe is a practicing physician, licensed by the Commonwealth of Pennsylvania, and registered with the Federal Drug Enforcement Administration. Between November 26, 1973, and May 29, 1974, two Commonwealth drug enforcement agents visited defendant at his office in his home and, between them, obtained 18 prescriptions for biphetamines, a Schedule II controlled substance. The prescriptions were never filled and were turned over to another agent, who headed the investigation, for use in obtaining an indictment and for use in evidence at trial.

Defendant was indicted on eighteen counts of dispensing and distributing biphetamines under 21 U. S. C. § 841(a)(1), which provides:

> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance."

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[1] See *United States* v. *Moore*, 423 U.S. 122, 124 (1975).

At the close of trial, the district judge instructed the jury that he was eliminating "distribution" from the case because, in his opinion, there was insufficient evidence to support conviction on that offense, and charged them on the offense of dispensation. The jury found defendant guilty on all 18 counts. Motions for acquittal and a new trial were denied by the district court; sentence was imposed, and this appeal followed.

II.

The term "dispense" is defined by 21 U.S.C. § 802(10), which provides, *inter alia*, that:

> "The term 'dispense' means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery."

The terms "deliver" and "ultimate user" are defined by 21 U.S.C. § 802(8) and (25), respectively, as follows:

> "The terms 'deliver' and 'delivery' mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.
>
> . . .
>
> "The term 'ultimate user' means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household."

Defendant contends on appeal that an essential element of the crime charged under 21 U.S.C. § 841(a)(1) was lacking because no ultimate user ever received possession

of the drugs, due to the fact that the prescriptions were never filled. We find this position to be without merit in view of the facts of this case.

III.

The Supreme Court has recently held, in *United States v. Moore*, 423 U.S. 122 (1975), that "registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice," at 124. Defendant does not contest the validity of this proposition. Rather, as noted, defendant raises the question of whether, under the terms and structure of this statute, possession by a putative ultimate user of prescriptions for a controlled substance is equivalent to possession of the substance. The crux of the question is the definition of "ultimate user," in 21 U.S.C. § 802(25), as someone who possesses a controlled substance. While that definition, standing alone, might suggest the construction defendant urges, it does not stand by itself, and it cannot be construed outside of the context of the Controlled Substances Act (CSA) and the congressional intent evinced by that statute.

The term "dispense" is defined by § 802(1) as delivery of a controlled substance to an ultimate user. Biphetamines are a Schedule II controlled substance, and delivery is defined by § 802(8) as their actual, constructive, or attempted transfer. Under the facts presented by this case, a prescription for a substance cannot be regarded as less than the constructive or attempted transfer of the substance itself, since a prescription is the written representation of the drug and enables its possessor to claim physical custody and control over the drug prescribed. While the term "possession" is nowhere defined in the CSA, to interpret it as defendant urges would not only contradict the explicit meaning of "deliver," the operative term in the definition of "dispense," but would also effectively read constructive and attempted transfers out of the

definition of "deliver." Defendant would have us hold that conviction on a charge of dispensing might be predicated upon constructive or attempted transfer to an ultimate user, but that no ultimate user would then exist, since, under the literal view of § 802(25) urged by defendant, that term requires "actual" possession—something quite impossible in the case of a constructive or attempted transfer.

To alter so dramatically the meaning of this statute, based upon the defendant's proferred [sic] and preferred definition of a term not defined therein would be to deny congressional intent, principles of statutory construction, and common sense—particularly when interpretation of that term in a manner consistent with relevant related terms of that same statute saves both the structure and the apparent intention of the Congress.

We note, particularly, the recent advice of the Supreme Court in this regard in *Moore, supra* at 145, quoting from *United States v. Brown*, 333 U.S. 18, 25-26 (1948):

> "The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose.... Nor does it demand that a statute be given the 'narrowest meaning'; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers."

In *Moore*, the Supreme Court found that Congress intended the CSA to "strengthen rather than weaken the prior drug laws," and particularly the Harrison Act (Narcotics) of 1914, 38 Stat. 785, predecessor of the CSA, under which "physicians who departed from the usual course of medical practice were subject to the same penalties as street pushers with no claim to legitimacy" (at 139).

In view of this teaching, we note the Supreme Court's declaration in *Jin Fuey Moy* v. *United States*, 254 U.S. 189, 192 (1920), a Harrison Act case involving conviction of a physician for dispensing large quantities of drugs without adequate physical examinations or instructions for use:

> "... it is easy to see ... that one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser."

United States v. Bartee, 479 F. 2d 484, 488 (10th Cir. 1973), cited by defendant, while not directly on point, supports the principle that the prescription is the instrument of the crime, as does *United States v. Green*, 511 F. 2d 1062, 1072 (7th Cir. 1975), holding in a § 841(a) case that writing the prescription completes all elements of the crime that would ordinarily be in the control of a physician.

In view of the above, we hold that by placing a prescription for a controlled substance, issued outside of the usual course of medical practice, in the hands of an ultimate user a physician completes the offense of dispensing under 21 U.S.C. § 841(a)(1).

IV.

The following additional contentions have been carefully considered by the court and rejected:

(1) that there was a failure of proof that defendant issued the prescriptions outside the customary course of medical treatment;[2]

(2) that the classification provisions of the Controlled Substances Act are so vague and indefinite as to be unconstitutional;[3]

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[2] Appendix at 47a-61a; *United States v. Tighe*, No. 74-204 (M. D. Pa., Aug. 13, 1976), at 13-17, reproduced in appendix at 390a, 402a-406a.

[3] *Iske v. United States*, 396 F. 2d 28, 31 (10th Cir. 1968).

(3) that evidence at trial showed that the indictment was improperly obtained;[4]

(4) that defendant was deprived of a fair trial by the improper and prejudicial closing arguments of Government counsel;[5] and

(5) that defendant was deprived of a fair trial by the admission of improper evidence and the charge of the court pertaining thereto.[6]

For the foregoing reasons, the judgment of the district court will be affirmed.

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[4] *Costello v. United States*, 350 U.S. 359, 361-62 (1956); *United States v. Calandra*, 414 U.S. 338, 342-45 (1974); *United States v. Wallace*, 528 F. 2d 863, 865 (4th Cir. 1976).

[5] *United States v. Tighe, supra* at 18-20, reproduced in appendix at 407a-409a.

[6] F. R. Evid. 404(b); *United States v. Stirone*, 262 F. 2d 571, 576 (3d Cir. 1959), *rev'd on other grounds*, 316 U.S. 212 (1960). No objections or requests for amplification were made at the conclusion of the court's charge to the jury, N. T. 306-08, reproduced in appendix at 316a-318a.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

(Caption Omitted in Printing)

Sur Petition For Rehearing

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ VAN DUSEN
Van Dusen
Judge

Dated: April 14, 1977

APPENDIX D

Ch. 13 Drug Abuse—Prevention, Control 21 § 802

§ 802. Definitions

As used in this subchapter:

• • • • • • • • • •

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1954.

• • • • • • • • • •

(8) The terms "deliver" or "delivery" mean the actual, constructive, or attempted transfer of a controlled substance, whether or not there exists an agency relationship.

• • • • • • • • • •

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

• • • • • • • • • •

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

• • • • • • • • • •

(25) The term "ultimate user" means a person who has lawfully obtained, and who possesses, a controlled substance for his own use or for the use of a member of his household or for an animal owned by him or by a member of his household.

21 § 811 Food and Drugs Ch. 13

PART B.—AUTHORITY TO CONTROL; STANDARDS AND SCHEDULES

§ 811. Authority and criteria for classification of substances —Rules and regulations of Attorney General; hearing

(a) The Attorney General shall apply the provisions of this subchapter to the controlled substances listed in the schedules established by section 812 of this title and to any other drug or other substance added to such schedules under this subchapter. Except as provided in subsections (d) and (e) of this section, the Attorney General may by rule—

(1) add to such a schedule or transfer between such schedules any drug or other substance if he—

(A) finds that such drug or other substance has a potential for abuse, and

(B) makes with respect to such drug or other substance the findings prescribed by

subsection (b) of section 812 of this title for the schedule in which such drug is to be placed; or

(2) remove any drug or other substance from the schedules if he finds that the drug or other substance does not meet the requirements for inclusion in any schedule.

Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rulemaking procedures prescribed by subchapter II of chapter 5 of Title 5. Proceedings for the issuance, amendment, or repeal of such rules may be initiated by the Attorney General (1) on his own motion, (2) at the request of the Secretary, or (3) on the petition of any interested party.

§ 812. Schedules of controlled substances—Establishment

(a) There are established five schedules of controlled substances, to be known as schedules I, II, III, IV, and V. Such schedules shall initially consist of the substances listed in this section. The schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after the date of enactment of this subchapter and shall be updated and republished on an annual basis thereafter.

Placement on schedules; findings required

(b) Except where control is required by United States obligations under an international treaty, convention, or protocol, in effect on the effective date of this part, and except in the case of an immediate precursor, a drug or other substance may not be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other

substance. The findings required for each of the schedules are as follows:

• • • • • • • • • •

(2) Schedule II.—

(A) The drug or other substance has a high potential for abuse.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) Abuse of the drug or other substances may lead to severe psychological or physical dependence.

(3) Schedule III.—

(A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II.

(B) The drug or other substance has a currently accepted medical use in treatment in the United States.

(C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

§ 829. Prescriptions—Schedule II substances

(a) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney Gen-

eral, such drug may be dispensed upon oral prescription in accordance with section 353(b) of this title. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

Schedule III and IV substances

(b) Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act, may be dispensed without a written or oral prescription in conformity with section 353(b) of this title. Such prescriptions may not be filled or refilled more than six months after the date thereof or be refilled more than five times after the date of the prescription unless renewed by the practitioner.

§ 841. Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

• • • • • • • • • •

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) • • •

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule

III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

§ 842. Prohibited acts B—Unlawful acts

(a) It shall be unlawful for any person—

(1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title;

• • • • • • • • • •

Penalties

(c)(1) Except as provided in paragraph (2), any person who violates this section shall, with respect to any such violation, be subject to a civil penalty of not more than $25,000. The district courts of the United States (or, where there is no such court in the case of any territory or possession of the United States, then the court in such territory or possession having the

jurisdiction of a district court of the United States in cases arising under the Constitution and laws of the United States) shall have jurisdiction in accordance with section 1355 of Title 28 to enforce this paragraph.

(2)(A) If a violation of this section is prosecuted by an information or indictment which alleges that the violation was committed knowingly and the trier of fact specifically finds that the violation was so committed, such person shall, except as otherwise provided in subparagraph (B) of this paragraph, be sentenced to imprisonment of not more than one year or a fine of not more than $25,000, or both.

(B) If a violation referred to in subparagraph (A) was committed after one or more prior convictions of the offender for an offense punishable under this paragraph (2), or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of $50,000, or both.

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs.

PATRICK L. TIGHE

Criminal No. 74-204

Indictment

THE GRAND JURY CHARGES:

That on or about the dates set forth in the Counts below, at Scranton, Lackawanna County, Commonwealth of Pennsylvania, within the Middle District of Pennsylvania and within the jurisdiction of this Court,

PATRICK L. TIGHE

did knowingly, wilfully, unlawfully and intentionally distribute and dispense a controlled substance, that is, biphetamine, a Schedule II controlled substance.

Count	*Date*
1	November 26, 1973
2	November 30, 1973
3	December 5, 1973
4	December 5, 1973
5	December 12, 1973
6	January 16, 1974
7	January 16, 1974
8	January 25, 1974

9	March 6, 1974
10	March 6, 1974
11	March 6, 1974
12	March 8, 1974
13	April 19, 1974
14	May 1, 1974
15	May 1, 1974
16	May 29, 1974
17	May 29, 1974
18	May 29, 1974

All in violation of Title 21 United States Code Section 841(a)(1), and Title 18 United States Code Section 2(b).

A True Bill

/s/ John L. Winder
Foreman

Date: Dec. 18th, 1974

/s/ S. John Cottone
United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

United States of America

vs.

Patrick L. Tighe

Criminal No. 74-204

Judgment and Probation/Commitment Order

June 11, 1976

With Counsel: Paul McGlone, Esq., Brooks Bldg., Scranton, Pa.

Not Guilty: Counts 1 through 18.

There being a finding/verdict of guilty, Counts 1 through 18.

Defendant has been convicted as charged of the offense(s) of 21 USC Sec. 841(a)(1) and 18 USC Sec. 2(b) did knowingly, willfully, unlawfully and intentionally distribute and dispense a controlled substance, that is, biphetamine, a controlled substance.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that

"On Count I, It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of 6 months and fined the sum of $15,000.00.

On Counts 2 through 18, the sentence is to be the same as that imposed on Count I and shall run concurrently for a total of 6 months imprisonment and $15,000.00.

The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

In addition to the imprisonment and fine set forth above, there is imposed on the defendant with respect to each of Counts 1 through 18, in accordance with the mandatory statutory requirements, a Special Parole Term of two years on each of said 18 counts, to run consecutively, for a total of 36 years."

Execution of the sentence is stayed for a period of 15 days.

[(275) 285a]

APPENDIX G

Colloquy

June 5, 1975
Federal Courthouse
10:00 a.m.

(The following discussion held in chambers.)

Mr. Kelly: Well, with respect to two and three, I object on the grounds that they are irrelevant, your Honor.

The Court: What are two and three?

Mr. McGlone: Copies of the Federal Register, July 7th and July 23rd.

The Court: The Government has withdrawn a request for a charge under 2B.

Mr. McGlone, do you have a motion?

Mr. McGlone: I have a motion that I want to offer in evidence Exhibits 1, 2 and 3. Number 1 being the package insert——

The Court: Is there an objection to it?

Mr. Kelly: Not to the package insert.

The Court: Admitted.

Mr. McGlone: Number 2 being the July 7, 1971 Federal Register; and number 3 being the July 23, 1971 Federal Register.

The Court: What is the purpose of those?

The Government objects to D2 and 3?

Mr. Kelly: Yes, we do.

The Court: I will permit it in evidence solely on the issue of intent.

[(276) 286a] Mr. McGlone: And date.

The Court: Well, the dates speak for themselves, but I am going to tell the Jury that biphetamine was a controlled substance on the dates in question. There is no doubt in my mind.

Mr. McGlone: Yes, on the dates—you have made that clear.

The Court: And I think the issue in this case is whether or not he violated 841. And if you want to argue intent and use these two exhibits, I will permit you to do it.

Mr. McGlone: Use the date, I am going to use the date.

The Court: All right.

Mr. Kelly: Do you plan to give a charge saying that we must prove that he knew these to be Schedule II?

The Court: No, I do not.

Government has submitted five points. There is an objection to number one. It is sustained.

(Discussion held off the record.)

The Court: Let the record show that I conferred with counsel, and I have told counsel that I intend to charge this Jury on dispensing only and not on distribution. And in doing so, I am relying on the authority of U.S. versus Leigh, 482nd, Federal 2nd, 206. In that case, the defendant doctor was indicted for distributing a controlled substance in [(277) 287a] violation of the Act. And the method of distribution was a prescription. The District Court dismissed the indictment for failure to state an offense against the United States. And the Circuit Court affirmed.

And I think that controls this case. If the facts in this case spell out anything, it is the dispensing rather than the distribution. And I think the Government has agreed that it is all right to charge on dispensing.

Mr. Kelly: Yes.

The Court: That being the case, what about your number one. Do you still insist on it?

Number one defines distribution.

Mr. Kelly: Your Honor, boy, I'll tell you, the way I read that. Deliver controlled substance, attempted transfer—I am not going to insist upon it. I will accept the Court's ruling on it, but . . .

The Court: Also with respect to number two which requests a charge that where several acts are in the disjunctive. I feel that that is no longer in this case because I am only going to charge on dispensing. There is an objection to number two, and I sustained that objection.

Number three requests a charge on an attempt to distribute a controlled substance; and in view of the statements I have just made that I intended to charge on dispensing only, this is no longer necessary. And I am not going to give that [(278) 288a] charge.

Number four, I am not going to give it as stated. However, I will tell the Jury that it is not necessary to show that the prescriptions were actually filled. That is not a necessary element of this crime.

Mr. McGlone: That, of course, I want to be on the record as objecting to, your Honor.

The Court: The fifth point, I am going to not give it in those words; but the substance of that is contained in another part of the charge. So you can argue it if you want to.

I feel if I were to give that I would be unduly emphasizing the Government's case. And that's why I am not going to give it the way it is written.

Mr. Kelly: That's the one that says——

The Court: The defendant has submitted four points for charge, I think.

We have discussed these, and all of them deal with character. There is no objection to number two, and I am going to give that together with another statement which is contained in my general charge on character evidence.

Mr. McGlone: That will be satisfactory, your Honor.

The Court: Fine.

(End of discussion in chambers.)

[(291) 301a]

APPENDIX H

Charge of the Court

I am not going to read these dates to you; you have the indictment with you. But the first date on Count One is November 26, 1973; and the last date is Number Eighteen, Count Eighteen, is May 29, 1974.

And this is in violation of Title 21 United States Code, Section 841(a)(1) and Title 18 United States Code, Section 2(b).

I tell you that Title 18 United States Code, Section 2(b) is not in this case, so your only concern is with Title 21, United States Code, Section 841(a)(1). And I will read that to you in a moment.

Section 841(a)(1) reads as follows: Except as authorized by this subchapter—and I say it reads, I am going to eliminate parts that are not pertinent here, such as the manufacturer. We are not concerned with the manufacture of this drug. And I am going to eliminate those parts which are not pertinent.

Section 841(a)(1) provides: Except as authorized by this subchapter it shall be unlawful for any person knowingly or intentionally one [sic], to distribute or dispense a controlled substance.

Now I am going to say at this moment, I will tell you now that we are only going to be concerned insofar as the biphetamines are concerned with the dispensing. It says it is unlawful to distribute or dispense. I am eliminating the dis- [(292) 302a] tribution because there isn't any evidence in my opinion in this case. The only evidence here, if you will believe it, is the dispensing of biphetamine, not the distribution.

I will, however, say something a little later about distribution when I refer to—I can't remember the name, but those pills in those brown bags there. Phendimetrazine. That, if you believe it, would be a distribution. I will come to that in a minute.

So the essential elements of this offense in 841(a)(1) are one, to dispense a controlled substance; and two, doing such intentionally, willfully and unlawfully.

I stated before the burden is always upon the Government to prove beyond a reasonable doubt every essential element of the crime. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

I mentioned to you that one of the elements was to dispense a controlled substance. A controlled substance means a drug or other substance included in Schedule I, II, III, IV or V. Now, we are only concerned in this law suit with Schedules II and III. And I charge you at this time that biphetamine is a controlled substance under Schedule II. So the term controlled substance means a drug included in II and III insofar as this case in concerned.

I mentioned as one of the essential elements of the [(293) 303a] crime which the Government must prove—they must prove it was dispensed. The controlled substance was dispensed. The term dispense means the prescribing pursuant to the lawful order of a practitioner. That is dispensing. I said to you during one of the closing arguments, it would not be necessary for the Government to prove that the prescription was filled. As a matter of fact, it is admitted in this case that those prescriptions were not filled.

Now, when I read you Section 841 I said except as authorized in this subchapter it shall be unlawful for any person to dispense a controlled substance. The exception is the case of a doctor. That is one of them anyway.

Section 829 of Title 21 of the United States Code exempts a medical practitioner—and that is together with the Code of Federal Regulations, but I won't read those to you—suffice it to say to tell you that a medical practitioner is exempted whenever such practitioner issues a prescription for a legitimate medical purpose and in the usual course of his medical practice.

A medical practitioner is exempted from 841(a)(1), in other words, a medical practitioner can dispense a controlled substance whenever he issues a prescription for a legitimate medical purpose and in the usual course of his medical practice. It is equally true that when he issues a prescription that is not for a legitimate purpose and is not in the usual course of [(294) 304a] his practice, he is not exempt from Section 841 of Title 21.

A prescription for a controlled substance must be used for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing of controlled substances is upon the prescribing practitioner.

A physician is expected to prescribe or dispense drugs within the bounds of his professional practice of medicine. A physician is restricted to dispensing or prescribing drugs in the bona fide treatment of a patient's disease. In determining whether the prescriptions given by Doctor Tighe, if any, were issued for a legitimate purpose in the usual course of his professional practice, you are to consider all of the evidence and circumstances in this case.

The burden is on the Government to prove this and every element of the offense beyond a reasonable doubt.

I told you a moment ago that a physician is exempt under certain conditions from the provisions of Section 841 of Title 21. That exception is contained in Section 829 of Title 21 and in pertinent part it reads: Except when dispensed directly by a practitioner to an ultimate user, no

controlled substance in Schedule II and so forth may be dispensed.

Then with respect to Schedule III, it says: Except when dispensed directly by a practitioner to an ultimate user, no controlled substances in Schedule III may be dispensed.

[(295) 305a] So it becomes important to define for you ultimate user. The term ultimate user means a person who has lawfully obtained a controlled substance for his own use or for the use of a member of his household.

Now, members of the Jury, in giving you and listing the elements of this crime for you I said it had to be done knowingly. The word knowingly means that the act was done voluntarily and purposely and not because of mistake or accident. Knowledge may be proved by conduct and by all the facts and circumstances surrounding the case. An essential element of the crime, before you can convict, is that it be done willfully.

An act is done willfully if done voluntarily and purposely and with the specific intent to do that which the law forbids. That is to say, with bad purpose either to disobey or disregard the law. Specific intent together with all the other essential elements of the offense must be proved beyond a reasonable doubt before you can convict.

Willfullness is an essential element of the crime. It requires existence of a specific wrongful intent, an evil motive at the time the crime charged was committed. Mere laxity, careless disregard of the duty imposed by law or even gross negligence unattended by evil motive are not probative of willfullness.

The crime charged in this requires proof of specific intent before the defendant can be convicted. Specific [(296) 306a] intent as the term implies means more than the general intent to commit the act. To establish specific intent, the Government must prove that the defendant knowingly did an act which the law forbids, purposely in-

tending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

An act or failure to act knowingly done, as I said before, done voluntarily and intentionally and not because of mistake or accident or other innocent purpose.

Now, in connection with intent, you may consider the Lackawanna Medical Journal which was introduced in evidence here. I permitted that in evidence only for the restricted purpose or limited purpose of determing [sic] in your consideration of whether or not any acts of the defendant were intentional.

Now, there has been quite a bit of evidence here about the reclassification of biphetamines. I have told you before that, and I charge you, that biphetamines were a Schedule II substance at the times concerned in this indictment. The reason for that when Congress passed the bill, the Act in 1970, it classified amphetamines as a Class III substance. Congress in the Act which passed this law, directed that the Attorney General from time to time after proper hearings and under certain procedures could add substances to the different Schedules, could move one substance from a Schedule to another, to a higher Schedule, to a lower Schedule and so forth. That is [(297) 307a] proper; it is provided in the Act.

But after the Act was passed and amphetamines were under Schedule III, I think the date is July 7, 1971 in the Federal Register there was a publication of the fact that amphetamines except for biphetamines were now under Schedule II. In other words, biphetamines at that time were reserved.

But shortly thereafter, that reservation was lifted and biphetamines became a Class II substance.

Now the fact that the defendant, if he did not know about that would not be a defense to the case. In other words, ignorance of the law is no excuse. However, if he

didn't know it, didn't have notice of that, you could consider that in determining whether or not he had the specific intent, the willfullness to commit this act. And that is why during the course of this trial once or twice when there was an objection made, I overruled the objection and said that the publication here, the material in the Federal Register, I thought was admissible, but for a limited purpose. And that is the limited purpose.

Also members of the Jury, with respect to intent, we have had testimony with respect to these pills in the brown bags. Now these were not prescribed. And according to the testimony in this case at various times when the agents came in, according to their testimony, they received these pills directly from the defendant. I permitted evidence of this only as [(298) 308a] evidence which you might consider together with all the other evidence in the case in determining whether or not the defendant had the requisite intent or willfullness.

I caution you that this defendant is not charged in this indictment with having delivered these pills in these yellow bags marked by the Exhibit GA1 and 2 and GB1 through 8. He is not charged, and you cannot consider it for that purpose. You can only consider it in determining whether or not he had the requisite intent to commit the acts in the indictment, counts one through eighteen.

The term distribute means to deliver a controlled substance.

What I am going to say now is relevant to the pills that the agents, the Government witnesses say were delivered to them. And also it is pertinent to the testimony of the witnesses who said that—one witness I think Mr. Caroff said he went in on November 14th and November 19th. And those two dates, members of the Jury, are prior to the first date in the indictment, November 26, 1973.

And Mr. Emery said he was in to see Doctor Tighe on November 14th. So what I am going to say now is relevant to that testimony.

And that testimony of those two witnesses, Caroff and Emery, with respect to the visits of November 14th and November 19th and Mr. Emery's testimony with respect to November

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[(300) 310a] And you might or might not, depending on how you find, draw the inference that the accused acted willfully and with the specific intent and not because of any mistake or inadvertence or any innocent reason. And also with respect to these visits of November 14th and 19th, you will remember the testimony that on those occasions, as I remember it, blood pressure was taken and I think stethoscope was applied to the heart.

You should not consider similar acts, that is, this evidence with respect to the pills in the brown bags, the pills the witnesses testified were given to them, or to the prescriptions given on the 14th or 19th. You should not consider those acts as evidencing a propensity of the defendant to commit the crimes charged. They are not relevant for that purpose and cannot be so considered. Now, I also want to mention to you that it was stipulated in this case that—again may I ask what is the name of that? That phendimetrazine is a Schedule III substance. It was so stipulated. Not a Schedule II. And in mentioning Schedule II and III insofar as it is relevant to biphetamine, I told you that I am charging you that biphetamine was a Schedule II substance at the times alleged in this indictment.

However, whether the Doctor knew it or not you may consider in determining whether or not he had the requisite intent or willfullness to commit this crime. In other words, did

[(305) 315a] Now, your verdict must be unanimous. It must represent the considered judgment of each juror. It is

your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment.

Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberation, do not hesitate to re-examine your own views and change your opinion if convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Mr. Kelly, are there any objections?

Mr. Kelly: I have no objections, your Honor.

Mr. McGlone: I do have one, your Honor.

The Court: All right. Do you want to come to sidebar.

(The following discussion was held at sidebar.)

The Court: Do you want to put your objection on the record.

Mr. McGlone: I object to the charge of the Court for the reason that the definition of the term ultimate user being a person who has obtained and possesses any controlled substance is inconsistent with the charge that the prescriptions [(306) 316a] need not be filled.

The Court: I intended that to apply to the—

Mr. McGlone: The phendimetrazine.

The Court: Phendimetrazine.

Mr. McGlone: I didn't quite understand that.

The Court: Well, listen, I will correct it. Anything else?

Mr. McGlone: No.

(End of discussion at sidebar.)

The Court: May I see counsel, please, a minute.

(The following discussion was held at sidebar.)

The Court: As I understand the defendant's contention, I defined ultimate user—and it is certainly relevant to the phendimetrazine because it was delivered to the ultimate user.

Mr. McGlone: Right.

The Court: There is no doubt about that.

Mr. McGlone: No question.

The Court: And I will tell the Jury to restrict it to that.

Mr. McGlone: All right.

(End of discussion at sidebar.)

The Court: Members of the Jury, I defined ultimate user for you as a person who has lawfully obtained a controlled substance for his own use. I intended that to apply to the [(307) 317a] phendimetrazine and not to the biphetamines. The biphetamines, of course, were prescribed. They were not handed over by the Doctor to the ultimate user. They were prescribed.

So I charge you that the term ultimate user as I defined it is limited—in this case it is limited to the phendimetrazine, those pink pills that were according to the testimony given in the Doctor's office.

Now, members of the Jury, if you have any questions while you are deliberating, write the questions on paper and put it in an envelope and seal the envelope and knock on the door and the bailiff will deliver the question to me.

Also if you should have a question and any answer that I might give, do not destroy it. We have prepared a verdict for you; and I am only going to read the first and last counts. I don't want to read them all, because they are all the same.

It says we the Jury find the defendant, Patrick L. Tighe as follows: blank on count one. You write in there guilty or not guilty. Do it with every count, guilty or not guilty. And the last one is, of course, count eighteen, guilty or not guilty to be signed by your foreman or forelady. That is the person who will be selected by you when you first go into the jury room. Select someone to conduct your deliberations.

And remember to excuse the alternates.

(Whereupon, the bailiff was sworn by the Court.)

[(75) 85a]

APPENDIX I

William Caroff—Direct

girls that I am giving them to.

Q. Did the Doctor ask you anything with respect to how old the girls were? A. Yes, sir, the Doctor asked me the ages of the girls, and I said they were about 26.

Q. And what did he say then? A. We had conversation to the effect that the Doctor didn't want me to give young girls—he didn't want any mothers calling him up and raising hell with him.

We get into it a little further, he asked wasn't I afraid the mothers would call up and raise hell with me. And I said no, I wasn't worried about them. Words to that effect.

Q. Did he ask you any questions with respect to how you were getting the prescriptions filled? A. Yes, sir. At this point to the best of my recollection, he told me not to take them to the same drug store.

Q. Not to take them to the same drug store? A. Right.

Q. Did he give you any reason why he didn't want you to take them to the same drug store? A. I would have to refer to my notes, if I could at this point.

Q. Sir, would your notes accurately reflect the conversation as you recall it between you and Doctor Tighe with respect to this subject? [(76) 86a] A. Yes, sir, it would.

Mr. Kelly: I request permission to show him his report with respect to this.

The Court: All right.

(Mr. Kelly hands document to witness.)

A. Yes, sir, at that occasion he asked if I was getting them filled at the same store, and I replied the girls got the prescriptions filled. And the Doctor stated make sure they don't take them to the same store. And I related to the Doctor that the girls knew what they were doing. And he said make sure you don't take them to the same store because I don't want to get into trouble.

Q. Did he ask you any questions as to whether or not you were taking any of the pills? A. Yes, sir, he asked me if I was using them; and I said I had taken a couple.

Q. Okay. And then do I understand, sir, that he gave you this prescription for biphetamine-20 that I am holding in my hand marked Government's Exhibit 4? A. Yes, sir.

Q. And again you have initialed and dated that? A. Yes, sir.

Q. November 26, 1973, is that correct? A. That is correct.

Q. Did he say anything to you as you were leaving the [(77) 87a] office? A. He said try to make these last a little longer.

Q. Try to make these last a little longer. And this was 32 capsules? A. Yes, sir, that prescription was for 32 capsules.

Q. Well now, this then was your third visit, is that correct? A. Yes, sir.

Q. Well, on this time did he check your blood pressure? A. No, sir.

Q. Did he check your heart? A. No, sir.

Q. Did he weigh you? A. No, sir.

Q. Did he have any conversation with you with respect to adverse effects, et cetera? A. No, sir.

Q. Did he make any record of this visit in your presence? A. Not in my presence, sir.

Q. By the way, this time did he give you any of these little pills like the kind we had previously? A. I didn't take these this time.

Q. You didn't take them? A. To the best of my knowledge.

Q. You say you did not take any?

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[(79) 89a] THE COURT: Yes.

A. Yes, sir. I said hiya, Doc. He said weren't you just in here last week. I hope you aren't taking these to the same drug store.

Q. What did you tell him? A. I replied the girls know what they are doing, Doc. I sat down next to the Doctor's desk. The Doctor sat down. He said what is your first name, I said William. He said the black ones, right. And I agreed.

And then he asked me my last name, and I spelled it out for him and he pronounced it.

Q. Did the Doctor ask you anything with respect to the girls and the pills? A. He asked me what they did with them, and I just said they liked them, Doc.

Q. Then at that time did he write the prescription? A. Yes, sir, he finished writing that one.

Q. I am showing you Government's Exhibit Number 6, a prescription made out to William Caroff dated December 5, 1973. On the back again it has your initials, December 5, 1973, is that correct, sir?

(Mr. Kelly shows document to witness.)

A. That is correct.

Q. And he wrote out that prescription for you. Now, on this visit, did he take your blood pressure?

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[(84) 94a] Exhibit Number 9, is that correct, sir? A prescription made out to William Caroff? A. Yes, sir.

Q. For 32 biphetamine-20's. And your initials and date on the back, is that correct, sir? A. That is correct.

Q. After he wrote out this prescription to you, sir, was there any discussion with respect to Sandy Deron? A. Yes, sir. I asked for one for my girlfriend, asked for prescrip-

tions for my girlfriends. And I gave the name Sandy Deron and the same address.

Q. I'd like to show you what has been marked as Government's Exhibit Number 10 and ask you whether or not that is a prescription made out for Sandy Deron and dated January 16, 1974 for 32 biphetamine tablets.

(Mr. Kelly showed document to witness.)

A. Yes, sir, it is.

Q. And on the back again your initials and the date, is that correct, sir? A. That is correct.

Q. All right. Now, at that time, did you ask him for a prescription for a second girl? A. Yes, sir, I did.

Q. What did he say? A. The Doctor replied no, it's too risky. [(85) 95a]

Q. Did he say anything else? A. He said they are checking now. And I asked him who's checking, Doc. And he said the federal agents.

He then showed me his BNDD number. It's a number——

Q. That is just what I was going to say. BNDD number, is there one on there? A. Yes, sir, there is.

Q. Where is it? A. It is in the upper right-hand corner, BNDD number, ATO 573988.

Q. Now, sir, continue the conversation with respect to the BNDD number. A. Well, Doctor said they can go into one drug store and make a photostat of a prescription, and go into another drug store and if they find the same address on the prescription, why—I'll have to refer back to this to get it right.

Q. Please do so, sir. A. And if they see some more from the same address then I am in trouble.

Q. What did you say about this other girl? A. I said this other girl has a different address, Doc.

Q. What did he say? A. He said better wait a couple weeks.

Q. All right. How much did this visit cost? A. This visit was $12.00.

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[(92)102a] store?

A. Well, the Doctor asked me where the girls got the prescriptions filled. And I said they got them filled down the line.

He asked me again, and I said towns down the line.

Q. Did the Doctor then say anything with respect to checking on the prescriptions? A. Well, the Doctor said at this time again they can make photostatic copies of the prescriptions. And I told him that the girls knew enough to take them to different stores.

Q. Did the Doctor say anything with respect to the containers you would be getting from the drug store? A. Yes, sir, the Doctor said words to the effect that if I gave any away to put them in a plain container. At this time he started looking for a prescription bottle that someone had brought in previously to show me where the doctor's name was on it.

Q. What did he tell you then? A. He said, you know, to put them in plain bottles. Put them in another container because the container from the drug store had the doctor's name on it.

Q. All right. At the time you were leaving the office was there any further conversation then? A. Well, when I left, the Doctor opened the door and said remember what I told you.

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[(94) 104a] A. Yes, sir.

Q. Did the Doctor ask you anything with respect to whether or not you were selling the pills? A. Yes, sir, the Doctor asked me if I was selling the pills.

Q. What did you say? A. I said no, Doc, I give them to the girls.

Q. Did he ask you what the girls were doing with them? A. The Doctor asked me if the girls were selling them.

Q. What did you tell him? A. I replied I don't know what they do with them, Doc.

Q. What happened after that then? A. The Doctor asked this agent what the girl's name was.

Q. And what name did you give him? A. Linda Hoffman.

Q. Did he ask you anything with respect to this Linda Hoffman? A. No, sir.

Q. Did he ask anything with respect to whether or not you had obtained a prescription for her before? A. Yes, sir, he asked me; and I said no.

Q. This was the first time? A. This was the first time, yes, sir.

Q. So did you give him an address for her?

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[(98) 108a] Q. And again on the back are your initials and the date? A. Right.

Q. All right. Well now, he filled out this prescription for Sandy.

Did you ask him anything about prescriptions for the other two? A. Yes, sir.

Q. What did he say? A. The doctor refused. He said it's too risky; the State Police are making photostats of my prescriptions and checking on me.

Q. What else? A. He said they are pretty tough. And I said they haven't brought any of mine in, have they, Doc. And he said no, but that is a different county, meaning I was down this way. I imagine the State Police up there were checking with him.

Q. Well, then did he make out the prescriptions for the other two? A. No, sir. I said you gave me prescriptions for the other two last time. And the Doctor said it's too risky, you don't have to worry about losing your license.

And I asked the Doctor, I said what are you talking about, Doc. He replied this isn't practicing medicine.

Q. He said this isn't practicing medicine?

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[(101) 111a] didn't have them. I was expecting to pick some up, but he didn't have them.

Q. What were you expecting to pick up? A. I don't know.

MR. MCGLONE: We object to this line of questioning.

THE COURT: Overruled.

BY MR. KELLY:

Q. What did you ask him for? A. I asked him for something like amphetamines.

Q. And then that was in the prior visit? A. Yes, sir.

Q. Now, this visit you had asked him whether or not he had got it? A. Yes, sir.

Q. And what did he respond to that? A. Well, he just shrugged his shoulders, and I repeated it. And then he said you don't understand the trouble I can get into.

Q. Go on. A. He went on about the Federal Narcotics agents having an outfit something like the FBI.

Q. Do you have a recollection from your notes as to what he said to you, sir? A. Exactly?

Q. Yes. [(102) 112a] A. The Doctor replied——

MR. MCGLONE: I object to this, your Honor, unless it is from his own recollection.

THE COURT: Overruled.

A. You don't understand the trouble I can get into. Don't you know there are Federal Narcotics agents, and they have an outfit something like the FBI. Then some of the states or all of the states have an outfit like the Federal Narcotics.

Q. Go on. A. Then the State Police have an outfit in the State Police to check our drugs. I guess they try to cut down on drug abuse. You know, some people use these drugs for diet and some use them for parties to get high.

Q. What did you say to that? A. I said what's so bad about that, Doc?

Q. What did he say? A. He said well, some 18 or 19 year old kids use them, and they go out and kill someone while they are driving a car.

And I replied those damn kids will use anything, Doc, but these aren't for kids.

Q. Well, then did the subject of the conversation turn towards the actual prescription? A. Yes, sir.

Q. And what did he ask you?

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[(105) 115a] said where are you going. I said Atlantic City. He said you can drop me a letter and I will send you some prescriptions. And then I said to him you didn't give me a prescription last time I was in for Linda.

And the Doctor said something like Linda can fly up in a helicopter and get one. It's not that far; you'll be coming up this way.

And I said hell, Doc, we're going to be gone all summer. We're not going to be coming back up here.

And he said tell Linda to take a helicopter up. And I replied Linda is going to be pissed off, Doc. Isn't there anything you can do for her.

And the Doctor replied they'll be checking on me.

Q. They'll be checking on me? A. Yes, sir.

Q. Then did the subject turn to money? A. I then asked the Doctor how much. And he said fifteen. And I paid the Doctor $15.00.

And then I asked the Doctor if there wasn't anything in this line he could give me for Linda. He gave me two of those manila envelopes.

Q. Two of them? A. Yes, sir. Then he went in the back room and brought two more out.

Q. And gave you these theoretically for Linda?

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[(140) 150a]

APPENDIX J

Thomas Emery—Redirect

left and took a manila-colored rectangular envelope and stated take these after supper.

Q. All right, sir, and did you place your initials and date on the envelope? A. Yes, out in Roger's car.

Q. And are these your initials? A. Yes.

Q. Okay. This is all on Government's Exhibit Number A2, is that correct, sir? A. Yes, sir.

Q. All right. After that, sir, was there any discussion with respect to how much you should pay him? A. I asked him how much a visit would cost.

Q. What did he say? A. $8.00.

Q. Did he ask you for any more money other than the $8.00? A. (Witness shakes head negatively.)

Q. Did you offer him any more money than the $8.00? A. No.

Q. Was there any conversation with respect to your coming back or being on any kind of a regular schedule of visits? A. As I was exiting the office, he said be seeing you. In one tone of voice. And as I was going through the door said come back. Which was octaves lower.

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[(144) 154a] A. Whereupon I sat down then at the visitor's chair in the Doctor's office there. And he started to write BI, B-I, on a prescription.

Q. Did he ask you anything else? A. Whereupon he asked me the black ones?

Q. What did you answer to that? A. I answered yes.

Q. What do you mean by the black ones, by the way? A. The coloring.

Q. The coloring of these pills? A. I forget what color they are now.

Q. Did he ask you again about the black ones? A. Yes.

Q. All right. What happened after that then? A. I added the term biphetamines to the word yes. He asked my name to which I said Tom Emery, adding my address was Wilkes College.

In the November 14th visit, though, he asked me where Wilkes College was. This time he did not.

Q. Okay. Well, sir, I'd like to show you what has been marked as Government's Exhibit Number 5 and ask you whether or not this is a prescription made out to Tom Emery, Wilkes College, Wilkes-Barre, Pennsylvania, dated November 30, 1973, prescribing 32 biphetamine-20's, is that correct, sir?

(Mr. Kelly shows document to witness.)

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[(153) 163a] Q. I ask you whether or not he gave you this prescription?

(Mr. Kelly shows document to witness.)

A. Yes.

Q. I call your attention to Government's Exhibit Number 16 which is a prescription for Tom Emery of April 19, 1974, prescribing 32 biphetamine-20's, is that correct, sir? A. Yes.

Q. And that is your initials and date on the back, is that correct? A. Yes, in pencil.

Q. Sir, did you ask him anything about a prescription for anyone other than you at this time? A. Yes, at this time I asked him for a prescription for my girl.

Q. What did he say? A. At this point there was hesitation.

MR. MCGLONE: We object to that, your Honor. It is a conclusion by this witness.

THE COURT: Overruled.

A. Said the drugs were being watched. Thereupon I asked him for an Rx for Eskatrol instead of biphetamines for my girl. He hesitated, and what to me seemed to be calculating his answer——

MR. MCGLONE: I object, your Honor——

BY MR. KELLY:

Q. Sir, you can't make any conclusion. You just tell me

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[(8) 334a]

APPENDIX E

Government's Closing Statement

I didn't say isn't it true that it increases suicidal tendencies. I didn't mention it. He did. They brought him all the way from New York to tell you the effect of this drug, and he did.

I submit that he told you honestly and straight forwardly when he told you that this drug could drive someone to commit suicide. I respectfully submit that we are not talking about a box of M&M candies. We are talking about a mighty potent brew, Ladies and Gentlemen, and I hope in the course of your deliberations you keep that subject in mind.

Phendimetrazine. Phendimetrazine is in these envelopes right here. I can give you the number of the—318 of these right here in front of you.

You can open up one of these and take a look at what they look like. They are not a real small pill. As you can see, they are pink and they look not an awful lot unlike an aspirin pill. But that's about where the similarity ends, isn't it?

Let's look at what Doctor Ward said about these. We didn't ask any expert what the effects of them were. We just threw them in. He threw them over the table; we threw them on this table.

Doctor Ward testified that these are like amphetamines in a lesser degree—and then you remember I was having a little trouble with him as to where the parting of the way was. He said well, they have fewer side effects.

[(9) 335a] Now, I respectfully submit for your consideration that if these drugs are in smaller dosages and

smaller strengths but otherwise similar to amphetamines but less side effects, that if someone were seriously interested in prescribing them for any kind of a legitimate medical purpose, that it would be a good idea to start somebody off on them and not bother with the amphetamines, especially not start them off with the strongest dose of amphetamines that the company makes. We'll get into that a little bit later.

Nor are we dealing with a small amount of these pills. Supposing we had a case where you had this very dangerous pill, such as what we have here. But on the other hand, you know, we've only shown that he was—you know, he was on a picnic sometime and some guy said gee, Doc, I don't feel too good; what have you got for me. And he said here, take a couple of these; it will perk up your golf game by the end of the afternoon.

We aren't talking about anything like that. We're talking, Ladies and Gentlemen, about prescriptions which total —and you can add them up yourself, maybe I can't add, but I think it comes up to 744 of these are being turned loose on society by the actions of this defendant in this case.

Seven hundred and forty-four. If we had them in a jar here, you could see 744 pills. If you had a transfer at one time of that it would be an outrageous situation. Here you [(10) 336a] not only have the outrageous situation, you have a continued course of conduct knowing every time that he gives one prescription that he has done everything he could do to turn 32 of those loose on some unsuspecting soul, knowing full well that the next time the guy comes in he's going to do it again. Knowing full well that the next time the guy comes in, he's going to do it again, and again, and again. That's what we are talking about in this case, Ladies and Gentlemen.

We have a total here of 1062 units of dangerous drug that this man knowingly, willfully and unlawfully turned loose on society. And that's what this case is about.

Now, with that introduction, I'd like to go on to review the evidence from which, I submit, you are going to be able to find beyond a reasonable doubt that—specifically relating to this case—that this defendant is guilty of all the offenses for which he has been charged.

First is the necessity to prove that biphetamine contains amphetamine. Now, that sounds kind of technical after what we have been through in this case, but you still understand that we have this burden to prove beyond a reasonable doubt that the defendant is guilty. Each and every element has to be proven beyond a reasonable doubt. One of the elements that has to be proven is that we have a drug involved here that contains amphetamine because that is what the law says. It doesn't say biphetamine, it says a substance containing

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[(15) 341a] prescribed and dispensed at one time in order to minimize the possibility of an overdose. And again that amphetamine should be administered at the lowest effective dosage and dosages should be individually adjusted.

That is how these drugs should be used as Doctor Notari told you. Just from your recollection of what the testimony was of these agents yesterday, does that sound anything at all like the use of these drugs in this case? I submit that thre is no similarity whatsoever.

At any rate, Doctor Notari did testify that before you were to put a patient on a diet involving the use of amphetamine, as a part of the treatment, you should get a history of the patient. Now, that makes perfect sense. In your own common sense, in your own everyday living, you all know that you consult physicians from time to time. And what is the first thing the doctor wants to know? He wants to know every disease you have had since you were three. He asks you diseases that you may have had four times and you were too young to remember, but he wants to know it.

And the reason he w. nts to know it is because he wants to know what effect these drugs h is going to give you are going to have on you. And as you can see, that is a perfectly legitimate thing to know.

And when you are dealing with a pill such as this, which I submit goes off like a bomb in your head and completely [(16) 342a] messes up all of your cardiovascular systems and otherwise, you certainly want to know what kind of a body you are dealing with before you put that bomb in the brain.

Here he wanted to know whether you had heart disease, past or present, high blood pressure, a hyperthyroid condition, other illness like diabetes, psychiatric disorders. In light of Doctor Ward's testimony that this drug increases suicidal tendencies, don't you think that that is a most relevant inquiry?

Physical exam in addition to just testing to find out the patient's history. How is he today? If I give him this pill today, what is it going to do to him? Because we don't know, he hasn't given it to him before.

Take a physical exam. At the very minimum, Doctor Notari said, take the blood pressure, a heart test, put the stethoscope on. He said it's a good idea to make records. Did you ever see a doctor who didn't make records in the course of his time in treating you? Would you feel good knowing you were going to start a course of treatment over a period of time and have him just sit there and—oh, well (gesturing), not making any notes. Would you really feel good about that? Would you in your own mind think you were being treated medically?

Let's go on. He said at the time of this first visit, you should put the person on a low calorie diet. What

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[(23) 349a] true, accurate, honest reflection as to what took place in this defendant's office on each and every occasion that we are going to talk about in a couple of minutes.

Now, in both cases just preliminarily, I think I mentioned this once, that Doctor Notari mentioned the use of these pills in a most effective and really the only legitimate use as far as he was concerned was the reduction of obesity.

You saw those agents on the stand. Did they look obese to you? I submit that they didn't. I submit that if there were two people who could walk into an office—other than me and a couple of other people—that absolutely don't need a diet, that it would be those guys.

Now, let's look to the actual facts. And again, the agents referred to these reports. Yes, I have a copy of these reports; and yes, you will notice that when I was asking the witnesses a couple of questions while they were on the stand I had a report right in my hand. I was following it right along, and you will notice that the agent was following it along.

I have it in my hand again, and I will refer to it from time to time. But I want you to keep this in mind that it is your recollection as to what the witness said from the stand that controls. It is not mine. I read this to refresh my recollection, and I submit that in the course of my referring to it that I will not deviate at all.

I submit, however, that should my recollection as I

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[(25) 351a] little pink pills. He gave them to him.

The guy asked, Caroff said, how much? And the Doctor said $8. So he paid him the $8 and went.

He testified that this was less than five minutes, this whole entire transaction.

You have all been to the doctor before. Doesn't that set an alltime record for the fastest initial interview with a doctor who is prescribing dangerous drugs that you have ever heard of in your life? But you will notice that in the indictment, Count Number 1, relates to the prescription for November 26 and this is November 14th. So what does it amount to?

It amounts to the fact that for having put the whatever they call it on his arm for blood pressure and maybe the stethoscope, we are going to give him that one. It is relevant to you for the purpose of showing motive, scheme, design and intent; and it is indicative of showing this Doctor's predisposition and activity and willingness to let these pills get out of his office without what anybody would refer to as an honest way of doing business in accordance with medical practice.

MR. MCGLONE: Again, your Honor, I renew my objection on the same basis.

THE COURT: I will sustain your objection. Disregard that remark, Ladies and Gentlemen of the Jury, with respect to

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[(28) 354a] one after breakfast in the morning. Yet he asked him are you only supposed to take one of these a day.

Isn't that another screaming flag that anyone could see that the purpose for which these pills are being obtained is abuse. Again, this visit took less than five minutes. Keep in mind that there was no test on the second visit, no check in weight, no blood pressure.

I'm sorry, he did take the blood pressure, and he may have tested the heart. So because of this, even in light of the other testimony with respect to not being a part of medical practice, we are going to give him that one.

It is relevant for the purpose of showing motive, scheme, design and intent. It is not one of the counts. This is another freebie. However, one week again—one week later—the 26th of November, 1973, in the door walked Bill Caroff again. And the defendant recognized him, and said weren't you just in here. And he said, yes, about a week ago, Doc. The Doctor said, what the hell are you doing with them? He said—now, listen to this——he said I have got a couple girlfriends who use them. I've got a couple girlfriends who use them.

The Doctor said how old are they. He said something to the effect that they are the age of 26.

Now, the Doctor asked him—the Doctor is filling out the prescription, asked him are you getting these filled at [(29) 355a] one store? And then Caroff said that he is not getting them filled at all but the girls are.

What does the defendant say? Make sure they don't take them to the same store because he doesn't want to get in trouble.

What does this indicate to you, Ladies and Gentlemen? Do we have even a remotest attempt, even the slightest disquise [sic] of practicing medicine, or do we have a man who is perfectly willing to turn these drugs loose on society to the same extent that any other person would do it illegally?

I submit not one iota. I submit the fact that he holds himself out as a doctor means that he can sign his name on the bottom line and the person can go down to the drugstore and get these drugs rather than going out to some kid on the street and get these drugs. That is the difference. I submit there is none.

Make sure they don't take them to the same store. What is that indicative of? It is obviously indicative of an attempt to make sure that nobody finds out that this is what he is doing. He doesn't want to get caught in this illegal

endeavor. He doesn't want his friend, Chief McCrone of the Scranton police force, to find out about this. What do you think the speech of the community would be if they knew he was selling drugs like that?

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[(36) 362a] what he did. Right here they are—120 amphetamine pills. Without knowing whether the girls were selling them or not. I will tell you this, the girls couldn't be selling them in any more deviation from proper medical standard than he was doing himself. That is one thing you can be sure of.

He then asked him again if he was taking the prescriptions to the same store, and then again he said the girls were the ones getting the prescriptions filled.

Again, this is another indication of what the actual intent of this defendant was throughout the course of this conduct. On this same date—that was a significant date, by the way—on March 6th, 1974, this defendant said to Caroff, he said look, if you give these pills away—if you give these pills away—put them in another container because the container from the drugstore is going to have my name on it.

If you are going to give these pills away, put them in some other container. An attempt to keep from getting caught. Pure and simple because he knows he is violating the law in this case.

Two days later—two days later—on March 8, 1974, again Caroff goes back to the defendant's office. And the defendant recognized him and said you were here just the other night. And Caroff says yes, Doc, because I hadn't been here for a while before that.

Again, defendant asked him if he was selling the

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[(45) 371a] Exhibit Number 16.

I guess I am running down a little on this, but it gets so repetitious. There is no sense in burdening you with every one of the details.

This time, of course, Emery asked for a prescription for his girl. The Doctor suggested that these drugs were being watched. There is no indication of any further discussion on the subject, so we won't refer to any. However, I just want to point out the fact that he didn't give another prescription for that extra girl.

So, through these agents I respectfully submit, Ladies and Gentlemen, for your consideration, that we have proven beyond any reasonable doubt, any reasonable doubt, that here is a clear, blatant violation of this statute as could be committed. Not just by someone who holds himself out to be a doctor, but by anybody who has a wherewithal to sign his name on the line and cause somebody else to fork over the actual pills. The crime could not be any more complete.

Now, on cross-examination of these witnesses, Mr. McGlone did ask them whether or not they had actually filled the prescriptions. And he is arguing that in order for him to commit the crime, you actually have to have the bottle of pills. So instead of having 21 prescriptions, he thinks we have to have—or he is going to argue that we have to have—21 bottle lined up here on the table.

[(46) 372a] And I respectfully submit to you that that would be an outrageous loophole for someone who has acted like this to get out of. And you will find that the law isn't that loose. You will find that the law is broad enough to cover the situation, and the Court will instruct you that it is not necessary that these agents actually take these to a drugstore so I can bring in and line up 21 bottles on here for you. Spend more of the government's money by buying them, by the way, to prove the elements of the offense.

When he wrote these prescriptions and he gave these to these agents, he did everything in his power to turn these pills loose on society.

What this defendant has done in this case, Ladies and Gentlemen, is to knowingly, willfully and unlawfully turn loose or do everything in his power to turn loose 1066 dangerous pills loose on some people. Like Linda Hoffman, Rita Cole and Sandy Deron, who, thank God, do not exist, because if they existed and they took these pills—unless they happened to be some real healthy specimens—could be in their grave as I am standing here talking to you now.

Yes, that is serious business. I don't know a crime that we prosecute in the Federal system that is any more serious. Do you? Can you think of a crime that we prosecute that is more serious than drug abuse?

National knowledge, this is so common, that if there [(47) 377a] is a problem we have in this country it has got to be drug abuse, and if we are to even participate in the fiction that we are going to do anything about it, we would have to put a stop to it wherever it may be found.

And if it is found with some kid up in Nay Aug Park, that is where it is found. And if it is found at 909 Pittston Avenue, that is where it is found.

I am not the one, he is not the one that decided, these agents aren't the ones who decided the locality of where this crime was going to be committed. None of us decided what educational background you had to have in order to complete the elements of this offense. The law did that.

And be he standing in Nay Aug Park with hair down to here or in his office——

MR. MCGLONE: Objection, your Honor, he is characterizing——

THE COURT: Sustained.

(Whereupon, Mr. Kelly continued his summation.)

MR. KELLY: Be he in his office, he is as susceptible and as liable for the prosecution of this crime as anyone else.

And the facts of the matter, I submit for your consideration, that given the educational background that he must have to hold himself out as a physician, given the availability right in his office, right in his office, of the clear warnings of this drug, given proper medical knowledge as respects the

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APPENDIX L

[(12) 22a]

Dr. William Head, Jr.—Redirect

The Court: I think so. I permitted earlier questions; I thought they were proper. I think you will have to have medical testimony for this.

Mr. Kelly: Very well, your Honor.

By Mr. Kelly:

Q. Now, Doctor, are you familiar with the history of biphetamine with respect to its being scheduled by the Government? A. Yes, I am.

Q. And what schedule is it currently in, sir? A. It is in Schedule II.

Q. And how long has it been in Schedule II? A. Since August of 1971.

Q. Since August of 1971? A. That's correct.

Q. And prior to that it was in what schedule, sir? A. It was in Schedule III prior to that.

Q. And how long was it in Schedule III? A. Schedule III became effective May 1, 1971.

Q. 1 May, 1971? A. That's correct.

Q. And then it was in Schedule III for a period of two months, is that what you are telling me? A. No. Nearer six months.

Q. Excuse me, please? [(13) 23a] A. May, June, July, August; nearly four months.

Q. Nearly four months, okay. 1 May, and what? A. It was August the 23rd.

Q. August 23rd? Then from the inception of this statute then in 1971, four months later it was made a Schedule II drug, is that correct? A. That's correct.

Mr. McGlone: Your Honor, I must object to that. The statute speaks for itself, and the statute as I have it provides for 1970.

Mr. Kelly: Your Honor, in his opening remarks he said he was going to tell what the period was of the various schedules. Here is a man who makes the drug, I thought I'd ask him.

The Court: I will permit it.

Mr. Kelly: Cross examine.

RECROSS EXAMINATION

By Mr. McGlone:

Q. Doctor, you have talked to us about stimulation effect, dizziness, nausea, tachycardia, and so forth.

Upon what do you base your statement that this drug can result in those conditions? A. That is based upon our official package insert, part of the labeling approved by the Food and Drug Administration.

Q. This then, I take it, is not of your own knowledge,

. . . . . .

[(16) 26a] A. Yes, we are.

Q. —whether or not in your capacity you have had occasion to deal with the Bureau of Narcotics and Dangerous Drugs or the Drug Enforcement Administration regarding biphetamine? A. Yes, I have.

Q. Were you in any degree involved in the matter of the hearings at the time that it was proposed to reclassify biphetamine?

Mr. Kelly: I object on the grounds of relevancy.

The Court: Overruled.

A. Yes, sir, I was.

By Mr. McGlone:

Q. You dealt directly with the Bureau? A. Yes, sir, I did.

Q. Representing the company? A. Yes, sir, I did.

Q. You are familiar with the Controlled Substances Act of 1970? A. Yes, I am.

Q. And you are aware that amphetamines and amphetamine products in 1970 were placed by Congress in Schedule III? A. Yes, sir, I am.

Q. Are you aware of the prescription requirements as to Schedule III substances? [(17) 27a] A. Yes, I am.

Q. How many prescriptions can be issued for that? A. A prescription may be written for a Schedule III substance, and that prescription may be refilled within a six month period with not more than five refills.

Q. On one prescription? A. Yes, sir.

Q. Now, for a Schedule II substance, what is the requirement as to that? A. One prescription only may be written, and that prescription may be filled but not refilled.

Q. All right, so now you have us up to October of 1970 when Congress placed biphetamine and amphetamine in Schedule III, is that correct? A. That's correct, sir.

Q. Are you first aware of when this product first came on the market? A. Yes, sir. Biphetamine was introduced to the market in 1955.

Q. '55? A. Yes, sir.

Q. And what was its first usage? A. Its first usage?

Q. Yes, sir. A. Obesity.

[(18) 28a] Q. And did it ever have a respiratory stimulant effect? A. Sir?

Q. Was it prescribed originally for a respiratory stimulatory effect? A. Not to my knowledge, no, sir.

Q. All right. Now, you have told us that in August 23, 1971, this was reclassified into a Schedule II substance? A. That's correct, sir.

Q. Where did you get that information from, sir? A. That information was published in the Federal Register of, I believe the date was July 7. Originally 1971 with a follow-up notice July 23, 1971.

(Document produced and marked D2.)

(Mr. McGlone hands document to witness.)

By Mr. McGlone:

Q. Doctor, I show you a paper marked D2. Can you tell us what that is? A. It is a copy of the Federal Register dated July 7, 1971.

Q. Now, is that the publication that you referred to? A. This is the original notice proposing to place certain amphetamine products from Schedule III to Schedule II.

Q. Proposing only? A. Actually transferring some and setting forth that certain companies had requested hearings upon the proposed transfer.

[(19) 29a] Q. Including Pennwalt? A. Including Pennwalt.

Q. What do they say about biphetamines in that publication? A. They indicate here that Pennwalt requested a hearing on the transfer of biphetamine from Schedule III to Schedule II.

Q. I direct your attention the very last paragraph in the lower right-hand corner of that publication.

Will you tell the Court and Jury what that says? A. It is——

Mr. Kelly: Excuse me, I perhaps will object. May I look at it first?

(Mr. McGlone hands document to Mr. Kelly.)

Mr. Kelly: I absolutely object on the grounds that all of this is irrelevant.

(Mr. Kelly hands document to the Court.)

The Court: Overruled.

(The Court hands document to witness.)

A. (Reading) It is further ordered that application of this order to Eskatrol, fetamin, biphetamine and biphetamine-T, the combination of products for which hearings were requested is reserved pending review of these products by the Bureau. Hearings regarding their transfer to Schedule II will be held after such review (End of Reading).

Q. And Doctor, by that order, amphetamines and their [(20)30a] substances were transferred to Schedule II, were they not? A. That is correct, except for the product's [sic] name.

Q. Including biphetamine? A. Including biphetamine.

Q. Right.

(Document produced and marked as D3.)

(Mr. McGlone hands document to witness.)

By Mr. McGlone:

Q. Doctor, I show you a paper marked for identification Defendant's Exhibit 3. Will you tell me what that is? A. It is a copy of the Federal Register, July 23, 1971.

Q. Yes, sir. Can you tell me what the effect of that was? A. This publication was the final notice actually transferring biphetamine, biphetamine-T and fetamin to Schedule II from Schedule III.

Q. Yes. Now, was there any hearing held with respect to that transfer? A. To my knowledge there was not.

Q. Were you part of the negotiation which resulted in the transfer of biphetamine to Schedule II? A. In an informal conference, yes, sir.

Q. Between you and who else? A. Other officers of our company and members of the [(21) 31a] Bureau of Narcotics and Dangerous Drugs.

Q. And as a result of that, what happened? A. As a result of the informal conference, Pennwalt Corporation withdrew its request for a hearing.

Q. What happened with respect to biphetamine-T? A. Biphetamine-T was transferred to Schedule II along with biphetamine.

Q. Was it withdrawn from the market? A. Biphetamine-T was withdrawn from the market at a later date, sir.

Q. Biphetamine remained a Schedule II drug, is that correct? A. That's correct, sir.

Q. Now, Doctor, to your knowledge is it not a fact that continuing on after this there were many compounds excepted from Schedule II which contained amphetamine and methamphetamine?

Mr. Kelly: Your Honor, the regulations will speak for themselves with respect to what is and is not included in Schedule II.

The Court: Do you object?

Mr. Kelly: Yes, I object.

The Court: Overruled:

A. To my knowledge, sir, there are some amphetamine and methamphetamine preparations in combination with other drugs [(23) 33a]

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A. Yes, we do. Q. Have you ever, after that publication which I have shown you of July 23, 1971, have you ever seen a republication of biphetamine in Schedule II?

Mr. Kelly: I object. Totally irrelevant.

The Court: Sustained. Excuse me, I didn't mean to do that. You are objecting to the question; I overrule your objection. I think it is relevant in view of his prior examination on direct examination.

A. Would you, sir, restate the question?

By Mr. McGlone:

Q. Yes, I will. There was a publication which you have seen here on July 23, 1971, wherein biphetamine was placed in Schedule II.

Have you ever seen a republication which placed biphetamine in Schedule II? A. No, sir.

Q. Doctor, you are familiar with the Physician's Desk Reference Manual? A. Yes, sir, I am.

Q. PDR, as it is referred to? A. Yes, sir.

Q. And you are familiar with the publications of that publication as it refers to biphetamine? A. Yes, I am.

[(24) 34a] Q. Doctor, from 1970 onward, particularly through 1973 and 1974, have there been any change in the Physician's Desk Reference Manual pertaining to biphetamine? A. I do not believe there has.

Q. They remained uniform throughout? A. Particularly the 1973-74 that you referred to.

Mr. Kelly: I object, your Honor, in the absence of a background showing that he has any familiarity with the publication of the Physician's Desk Journal.

The Court: Overruled.

By Mr. McGlone:

Q. Are you familiar with the statment [sic] which occurs in the PDR, as I will call it, which contains in a box similar to the one in your package insert and which makes this statement—final classification of the less than effective indications requires further investigation? A. Yes, sir, I am familiar with that.

Q. You are? A. Yes, sir.

Q. And are you familiar that that has appeared in the manual in all the years concerned here, 1973 and 1974? A. Yes, I believe it would.

Q. Doctor, after your company became aware that this substance had been reclassified from Schedule III to Schedule II, did your company take any steps to notify the practicing physi- [(25) 35a] cians who used this substance that it had been changed in classification? A. We did to an extent, sir.

Q. What did you do? A. We notified those physicians who are our direct customers, in other words, who are our direct customers of our company. We also notified the wholesale and retail pharmaceutical trade, of course.

We further published the symbol controlled substance, C2, on the label of the products later in the year 1971.

We revised the monograph in the PDR. I believe that probably would have taken effect in 1972 showing the new classification. That is about the extent of it, I believe.

Q. As an ordinary thing, you didn't sell to the doctor, did you? A. To the defendant, sir?

Q. Well, to the defendant, yes? A. To my knowledge we did not.

Q. So that the knowledge that you disseminated was directed to the pharmaceutical house primarily, correct? A. No, sir, I wouldn't say that exactly. Particularly when we published the new symbol in the PDR copy the following year and in subsequent years showing the Schedule II. This would have been, I believe from 1972 onward.

Then, of course, on our labels, this goes out to [(26) 36a] generally the pharmaceutical trade.

Q. Not to the medical trade? A. It can go to the medical trade, yes, sir.

Q. You do have what is known as a detail man, who goes around and contacts the physicians, do you not? A. Yes, we do.

Q. Did you furnish any material for him to pass out to the medical practitioners he contacted? A. Yes, sir, we do furnish such material.

Q. Did you do that? A. For a time we did. However, we discontinued the marketing and promotion—I should say the promotion and advertising of biphetamine to the medical profession at about that time.

Q. About what time? A. At about the time it was named a Schedule II drug.

Q. So then now, you have told us in August 23, 1971 that it became classified as a Schedule II drug. Do you care to amend your testimony in view of the publications I have shown you? A. Amend it in what way, sir?

Q. You have told us August 23rd was the effective date of the change to Schedule II, is that correct? A. That's correct.

Q. Even through the Federal Register that I have shown

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[(31) 41a] medical use in treatment in the U.S.A., and that abuse of the drug of other substance may lead to moderate or low physical dependence or high psychological dependence (End of Reading).

Q. So calling your attention first of all to the requirements as to the psychological dependence.

In Schedule III, you have a requirement that it involves high psychological dependence, is that correct? A. That's right, sir.

Q. What is the requirement as to Schedule II? A. Schedule II indicates that the drug may lead to severe psychological or physical dependence.

Q. Now, Doctor, can you tell us the borderline where you cross from severe psychological dependence to high psychological dependence? A. No, sir, I don't think that I can.

Q. In this matter of biphetamine, I think perhaps you will agree with me that there is no matter of physical dependency involved, is that correct?

Mr. Kelly: I object. This calls for a medical conclusion, and he disqualified himself on that basis.

The Court: I will sustain the objection.

By Mr. McGlone:

Q. Do you know whether the Hearing Examiner who issued an order as to amphetamines determined that there was no physical dependence involved in amphetamines?

[(32) 42a] Mr. Kelly: Object again.

The Court: Sustained.

By Mr. McGlone:

Q. So that you cannot 'ell me where is the borderline as to high and as to severe, is that correct, psychological? A. I cannot, no, sir. I think that is a matter of weighed medical judgment.

Q. Now, as to the potential for abuse, in Schedule II drug we find that it has a high potential for abuse, is that right? A. That's correct, sir.

Q. In Schedule III, it is a potential for abuse less than Schedule II.

Mr. Kelly: Excuse me, your Honor, I believe he misread Schedule II, if he read it right the first time.

The Court: He has the right to cross examine this witness.

Mr. Kelly: I appreciate that.

By Mr. McGlone:

Q. Where is the borderline for potential for abuse between high potential for abuse and less than high potential for abuse? A. Again, this would be a matter of weighed judgment, I believe, between medical findings and the Drug Enforcement Administration.

[(33) 43a] Q. You are not able to tell us, Doctor? A. Not directly, no, sir.

Q. You told us, I believe, that you are familiar with the publication of the order by the Director of the Bureau as of July 7, 1971? A. That is correct, sir, transferring to Schedule II.

Q. And I will direct your attention to—well, perhaps I better point to you because I can't make out the number.

(Mr. McGone [sic] shows documents to witness.)

Q. That particular part of the order that I have pointed to you, will you tell us what that states? A. It is a section stating that after careful consideration of the date

submitted to the DEA that the Director of the Bureau of Narcotics and Dangerous Drugs has reached the conclusions that abuse of these substances may lead to severe psychological dependence.

Q. Psychological? A. That's correct, sir.

Q. No finding as to physical dependence, is that correct? A. No, sir.

Q. In the years 1973 and 1974, which are the years we are concerned with here, what was the total number of biphetamine tablets manufactured by your company?

Mr. Kelly: I object on the grounds that that is

APPENDIX M

Dr. Charles Ward—Direct

[(206) 216a] Q. Calling your attention to Schedule II drugs, under A, the drug or other substance has a high potential for abuse.

And calling your attention to Schedule III, the drug or other substance has a potential for abuse less than the drugs or other substances in Schedules I and II.

Are you familiar with those provisions? A. Yes, I am.

Mr. Kelly: I object on the grounds it is totally irrelevant to this case.

The Court: Overruled.

Mr. McGlone: I haven't asked the question yet.

The Court: Overruled.

By Mr. McGlone:

Q. Can you tell us where the boundary line falls between Schedule II and Schedule III as to the potential for abuse as to those two substances? A. The one calls the abuse potential high and the other calls the abuse potential less than high. But I, in my own judgment, can't make a distinction. The language is very vague and indefinite.

Mr. Kelly: I object to that on the basis of pure conclusion of law.

The Court: Overruled.

By Mr. McGlone:

Q. Now, calling your attention to B in the differentiation [(207) 217a] between B on Schedule II and B on Schedule III.

In effect that as to Schedule II drugs, they have a currently accepted medical use with severe restrictions. And

as to Schedule III, they have a currently accepted medical use in treatment in the United States.

Do you know what the differentiations are as far as prescribing those drugs? A. No, I don't. Again I would think that the language is vague and indefinite.

Q. You don't know what the severe restrictions amount to?

Mr. Kelly: I would just like to pose a continuing objection to this line so I won't have to keep objecting.

The Court: Overruled.

By Mr. McGlone:

Q. Again as to number C, abuse of the drug or other substances may lead to severe psychological or physical dependence pertaining to Schedule II drugs.

And with respect to Schedule III drugs, abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence.

Doctor, can you tell us where the boundary line falls between severe psychological dependence and high psychological dependence? A. No, I can't. Again I think the language is vague.

Q. And indefinite? [(208) 218a] A. Yes.

Supreme Court, U. S.
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No. 76-1590

In the Supreme Court of the United States

OCTOBER TERM, 1977

PATRICK L. TIGHE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 22a-28a) is reported at 551 F. 2d 18. The opinion of the district court (Pet. App. 1a-21a) is not reported.

QUESTIONS PRESENTED

1. Whether testimony by undercover agents concerning statements of petitioner while selling them prescriptions was properly admitted into evidence.

2. Whether the Attorney General could properly classify biphetamine as a Schedule II controlled substance under the Controlled Substances Act, 21 U.S.C. 801, *et seq.*

3. Whether petitioner had, or reasonably could have been expected to have, notice of biphetamine's inclusion as a Schedule II controlled substance under the Controlled Substances Act, 21 U.S.C. 801, *et seq.*

4. Whether petitioner could properly be convicted for violating 21 U.S.C. 841(a) despite the fact that none of the prescriptions that he sold to undercover agents was filled.

5. Whether the evidence presented at trial was sufficient to support the conviction of petitioner for violations of 21 U.S.C. 841(a).

6. Whether petitioner was deprived of a fair trial by the closing argument of the prosecutor.

7. Whether the trial court's instructions to the jury were so confusing and improper as to constitute grounds for reversal.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of eighteen counts of dispensing a Schedule II controlled substance, biphetamine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2(b). He was given concurrent sentences of six months' imprisonment and a fine of $15,000 on each count, the imprisonment to be followed by a total special parole term of 36 years (Pet. App. F). A motion for a new trial was denied by the district court (Pet. App. 1a-21a), and the court of appeals affirmed (Pet. App. 22a-28a).

The evidence showed that over a six-month period petitioner, a licensed and practicing physician, sold 18 prescriptions for biphetamine to two state undercover drug enforcement agents who visited him at his office

(Pet. App. 23a). Biphetamine contains amphetamine and is used medically for obesity. Petitioner charged $8.00 for a single prescription of 32 to 40 tablets, $12.00 for two such prescriptions, and a negotiable fee of $15.00 to $20.00 for three prescriptions (see Pet. App. 15a). Petitioner provided the prescriptions without conducting any physical examination of the undercover agents and without obtaining the agents' medical history. In addition, petitioner was told that the agents would themselves transfer the prescribed drugs to third persons (*ibid.*). In fact, the agents never had the prescriptions filled, but instead placed them in the investigation file (Pet. App. 23a).

ARGUMENT

1. There is no substance to the claim (Pet. 10-17) that incriminating statements made by petitioner were improperly placed into evidence. The statements were made by petitioner in the course of selling prescriptions to undercover agents. The agents' conduct did not violate *Miranda* v. *Arizona*, 384 U.S. 436. The warnings required by that decision must be given only when the subject of a police investigation has been taken into custody or otherwise deprived of his freedom in a significant way. *Beckwith* v. *United States*, 425 U.S. 341. Nor was the agents' testimony concerning statements made by petitioner on several occasions when prescriptions were sold hearsay. Fed. R. Evid. 801(d)(2). *A fortiori*, it was not inadmissible hearsay.

2. Petitioner contends (Pet. 17-20) that classification of biphetamine as a Schedule II controlled substance is improper because accomplished pursuant to an unconstitutional delegation of legislative power in 21 U.S.C. 811(a)(1). Section 811(a)(1) authorizes the Attorney General,

after he has made appropriate findings, to transfer controlled substances between the schedules established in Section 812. The district court correctly concluded that the statute does not contain an unconstitutional delegation of legislative power. In Section 811(c), Congress has provided a detailed list of factors for the Attorney General to consider in exercising his authority under Section 811(a)(1). In addition, Section 811(b) requires the Attorney General to consult with the Secretary of Health, Education, and Welfare before transferring a controlled substance from one schedule to another. The Secretary is directed to provide a written scientific and medical evaluation of the substance under consideration, together with a written recommendation as to whether the substance should be controlled, and, if so, under which schedule. The criteria for inclusion under a particular schedule are not unconstitutionally vague. Inability of pharmacologist witnesses to define the phrase "severe psychological or physical dependence" hardly demonstrates that that language is not susceptible of meaningful application by qualified medical personnel. In sum, action by the Attorney General under Section 811(a)(1) is clearly governed by adequate statutory standards. See *United States* v. *Pastor*, 419 F. Supp. 1318, 1334-1340 (S.D.N.Y.); see also *Iske* v. *United States*, 396 F. 2d 28 (C.A. 10); *White* v. *United States*, 395 F. 2d 5 (C.A. 1), certiorari denied, 393 U.S. 928.

3. The evidence at trial revealed that petitioner knew he was acting unlawfully in selling biphetamine prescriptions. Petitioner should not be heard to complain that he was unaware of the reclassification of biphetamine from Schedule III to Schedule II, since his acts would have been illegal regardless of the schedule applicable to the drug. If such information was critical to petitioner's decision whether or not to violate the statute,

it was readily available, not only in the Federal Register but also from the manufacturer of biphetamine. See Pet. App. 11a.

4. Section 841(a)(1) makes it unlawful for any person knowingly or intentionally to dispense a controlled substance, except as authorized by statute. Under Section 802(10), the term "dispense" means "to deliver a controlled substance to an ultimate user * * *." Section 802(8) provides that the term "deliver" means "the actual, constructive, or attempted transfer of a controlled substance * * *." Petitioner's sale of biphetamine prescriptions plainly constituted an attempted transfer of a controlled substance. Petitioner's focus (Pet. 25-26) on the definition of the term "ultimate user" is misplaced. As the Third Circuit noted in its opinion, if proof of an attempted transfer to an ultimate user required proof that that user had obtained actual possession, *attempted* transfer would essentially be eliminated from the definition of the terms "deliver" and "dispense." See Pet. App. 25a-27a.

United States v. *Green*, 511 F. 2d 1062, 1072 (C.A. 7), certiorari denied, 423 U.S. 1031, is not to the contrary. There, the Seventh Circuit held that "a prescription need not be filled to make out a case of attempting to dispense against a physician." The court did not decide whether "a prescription must be filled to complete the crime of dispensing a controlled substance." Since the term "dispense" includes attempted transfer, proof that a prescription was filled is not a prerequisite for conviction of the completed offense.[1]

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[1]Even if this statutory construction were incorrect, and such proof is necessary for conviction of the completed offense, petitioner is at most entitled to entry of a judgment of conviction for attempting to dispense a controlled substance. The penalties applicable to

5. Petitioner contends (Pet. 27) that since he is a physician, his violation of the statute must be blatant before he may be prosecuted under Section 841(a). This is incorrect. See *United States* v. *Moore*, 423 U.S. 122. In *Green, supra*, the Seventh Circuit was confronted with facts virtually identical to those presented here. The court affirmed a conviction under Sections 841(a) and 846 for attempting to dispense a controlled substance. The court did not suggest that prosecution under Section 842 might have been more appropriate.

6. Petitioner also seeks (Pet. 21-25) review of the propriety of the prosecution's closing argument. Examination of that argument (set forth at Pet. App. 66a-76a) reveals that petitioner's complaints are groundless. Petitioner objected on only a few occasions at the time the prosecutor's remarks were made; in those instances, his objections were sustained. Nothing in the remainder of the prosecutor's statements constitutes plain error justifying reversal despite lack of contemporaneous objection, and there is no occasion for this Court to undertake review of the determination of the lower courts (Pet. App. 19a-21a, 27a-28a) that petitioner is not entitled to a new trial on this ground.

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the attempted and completed offenses are the same, and the district court was clearly aware of all those facts concerning petitioner's conduct which were relevant to determination of sentence. Since the jury returned a guilty verdict on the charge of dispensing, it necessarily found facts sufficient to support a conviction for attempting to dispense. Modification of the district court's judgment in the manner suggested is appropriate even where, as in this case, the district court did not instruct the jury on attempt. See 28 U.S.C. 2106; *United States* v. *Swiderski*, 548 F. 2d 445 (C.A. 2) (no instruction given as to simple possession, but judgment modified from conviction of possession with intent to distribute to conviction of simple possession).

7. Petitioner attacks (Pet. 28-30) a portion of the district court's instructions to the jury as confusing. Petitioner was charged with dispensing a controlled substance, namely biphetamine. The definition of the term "ultimate user" was, of course, relevant to the formal description of that offense. After objection by petitioner stressing that none of the prescriptions at issue had ever been filled, the district judge informed the jury that he intended the definition of "ultimate user" to apply only to the phendimetrazine, pink pills introduced for the limited evidentiary purpose of showing intent and not mentioned in petitioner's indictment. To the extent that the district judge may have erred in so instructing the jury, his error was harmless. The court had already ruled as a matter of law that the crime of dispensing a controlled substance could be established even without proof that the prescriptions for biphetamine had been filled. This ruling was correct, as demonstrated in point 4, *supra*. Moreover, the district court made perfectly clear to the jury that petitioner was not being charged with any offense involving phendimetrazine, and indeed petitioner was convicted of no such offense. Petitioner thus suffered no prejudice from any confusion that may have surrounded the district court's instruction concerning the definition of "ultimate user."

In light of the district court's charge, the judgment of conviction should have contained no reference to either distribution of a controlled substance or violation of 18 U.S.C. 2(b). The judgment adhered too closely to the language of petitioner's original indictment. Even conceding this, however, mistakes made in drafting a judgment that the court entered in June 1976 can hardly be thought to reflect error or confusion in instructions given to the jury by the district court more than a year earlier.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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